78-599

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Secretary of the Navy and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-32a) is reported at 575 F.2d 907. The opinion of

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[1] The other defendants are the Commandant of the Marine Corps and several military officers responsible for implementing and enforcing Navy and Marine Corps regulations in the Pacific Fleet and at the Marine Corps Air Station in Iwakuni, Japan.

the district court (App. B, *infra*, 33a-50a) is reported at 413 F. Supp. 863.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 51a-52a) was entered on March 15, 1978. A petition for rehearing was denied on May 15, 1978 (App. D, *infra*, 53a). On August 7, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 12, 1978. On September 1, 1978, Mr. Justice Brennan further extended the time to October 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Navy and Marine Corps regulations that require military personnel located at a foreign duty station to obtain approval before circulating on the base petitions to members of Congress are invalid under 10 U.S.C. 1034.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) provides in relevant part:[2]

a. Section 3(b).

> No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.

b. Section 4(a).

> Commanding generals and commanding officers will control or prohibit the unauthorized activities described in subparagraphs

[2] Four Navy and Marine Corps regulations are at issue in this case. Each regulation has the same operative language as the one quoted in the text; they differ only on the geographic area in which they apply. See App. A, *infra*, 7a. The challenged regulations are paralleled by regulations adopted by the Army and Air Force. See *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972).

3a, 3b, and 3c above if, in their judgment, the activity would:

> (1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or,
>
> (2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates, insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

STATEMENT

1. Navy and Marine Corps regulations provide that no servicemen shall "distribute or promulgate petitions, publications * * * handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or * * * on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained." FMFO 5370.3, § 3(b) (1974). The regulations further provide that the commanding officer should deny approval if the material proposed for distribution would

(1) materially interfere with the safety or duties of the command, (2) "[p]resent a clear danger to the loyalty, discipline, morale, or safety" of the personnel in the command, (3) cause or advocate insubordination, disloyalty, desertion, or contain obscene matter, or (4) involve the planning of an unlawful act. *Id.*, § 4(a).

During 1974 respondents, three Marine Corps servicemen stationed at the United States Marine Corps Air Station at Iwakuni, Japan, sought prior approval from their base commander to distribute copies of petitions to members of Congress. One petition objected to the use of military personnel in labor disputes; a second supported amnesty for those who resisted conscription or deserted the armed forces during the Vietnam war (App. B, *infra*, 39a). The base commander denied permission to circulate these two petitions on the base (*ibid.*).[3] Respondents Huff and Falatine distributed, without seeking permission, copies of a third petition objecting to United States support for the government of South Korea (*id.* at 40a). They were arrested; Huff was convicted after a court-martial. After the arrests respondent Gabrielson sought permission to distribute the South Korea petition on and off the base; the base commander granted permission for on-base circulation, provided that the circulation was non-argumentative and did not take place in the barracks (*id.* at 40a-41a).

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[3] After their request to circulate these petitions was denied, respondents sought permission to circulate a leaflet setting

Respondents then filed this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against further enforcement of the military regulations. They alleged that the regulations are an unconstitutional restraint on First Amendment expression and are invalid under 10 U.S.C. 1034, which prohibits any person from "restrict[ing] any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." Respondents sought, and obtained, certification of the case as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan * * *."[4]

The district court granted respondents' motion for summary judgment. The court held that "the very system of prior restraints for serviceman-to-serviceman distribution of materials on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment freedoms" (App. B, *infra*, 45a). The court also concluded that the base commander's decision to prohibit or restrict distribution of the three specific petitions to

forth their interpretation of the constitutional rights of servicemen (*ibid.*). The base commander denied permission to circulate this leaflet as well (*ibid.*). During the course of this litigation petitioners conceded that the base commander lacked a proper basis under the military regulations for refusing to allow distribution of these materials (App. A, *infra*, 3a).

[4] Order filed July 17, 1975, at 4.

members of Congress was not grounded in a sufficient showing of military necessity and was therefore invalid under 10 U.S.C. 1034 (App. B, *infra*, 44a).[5] Accordingly, the court entered an injunction prohibiting the military officials from applying the challenged regulations to require prior approval for the "distribution of printed materials during off-hours and away from restricted or work areas on-base at the Marine Corps Air Station, Iwakuni, Japan" (App. F, *infra*, 57a).

2. The court of appeals held that the "focal point" of the litigation is on petitions to members of Congress and that the validity of the regulations with respect to other types of written materials could not properly be decided on the record in this case (App. A, *infra*, 5a-7a). The court therefore rejected the broad holding of the district court that the prior approval requirement of the regulations is invalid as applied to all written materials distributed on base (*id.* at 5a-7a, 21a).

The court of appeals found it unnecessary to decide whether the regulations' requirement that military authorities give prior review to petitions to members of Congress is an unconstitutional "prior restraint" on expression.[6] The court concluded in-

[5] The district court upheld application of the prior approval requirement to off-base petitioning in foreign countries (App. B, *infra*, 48a-50a). Accordingly, it did not disturb the sanctions imposed for the off-base distribution of the South Korea petition (see *id.* at 50a).

[6] The court noted, however, that under *Parker* v. *Levy*, 417 U.S. 733 (1974), "the presumption against prior restraints

stead that application of the prior approval requirement to such petitions is invalid under 10 U.S.C. 1034, which prohibits regulatory restrictions that are not "necessary to the security of the United States." Although the court recognized that the prior approval requirement contributes to "order and discipline" at the "combat ready" Iwakuni Air Station,[7] the court concluded that avoiding "lapses of military discipline" is not "necessary to the national security" (App. A, *infra*, 16a). Moreover, the court suggested that the military interest in preventing on-base distribution of "petitions which prove to be improper in their content" (*id.* at 17a) may be adequately protected by sanctions imposed after distribution has occurred. The court thus affirmed the injunction to the extent that it forbids application of the prior approval requirement to the distribution of servicemen's petitions to members of Congress.

Judge Tamm filed a separate opinion arguing that the judgment of the district court should be reversed in its entirety (App. A, *infra*, 22a-32a). Reviewing the legislative history of 10 U.S.C. 1034, Judge Tamm determined that the statute is intended to

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would not be as great [in the military context] as it is in the civilian context; and we would be required to undertake a careful balancing of competing first amendment interests and military requirements" (App. A, *infra*, 9a).

[7] During 1972 and 1975 units were deployed directly from Iwakuni Air Station to combat and relief operations in Viet Nam. Similar deployments to Thailand and Cambodia also occurred during these years (App. A, *infra*, 28a-29a).

proscribe only interference with a serviceman's personal, private communications to members of Congress. Application of the prior approval requirement to the distribution of petitions, however, affects only collective petitioning activities and does not restrict personal or private communications. Accordingly, Judge Tamm concluded, 10 U.S.C. 1034 does not apply to the regulations challenged in this case (App. A, *infra*, 26a). Judge Tamm also argued that even if Congress intended 10 U.S.C. 1034 to apply to both individual and collective petitioning activity, the prior approval requirement is valid because the maintenance of order, discipline, loyalty, and morale at a combat-ready military facility is necessary to the security of the United States within the meaning of that statute (App. A, *infra*, 26a-31a).

REASONS FOR GRANTING THE PETITION

The military departments of the United States believe that some form of prior review by command personnel of proposals to circulate petitions on military bases is essential to the discipline, readiness and morale of the armed forces, and is thus necessary to the security of the nation. Under the decision of the court of appeals, however, the military departments are powerless to stop the on-base circulation of petitions to members of Congress even when such petitions pose a clear danger to military discipline, loyalty, or morale, even when they materially undermine the effective accomplishment of the assigned military mission, and even when the petitioning occurs at a

combat-ready facility on the periphery of our defensive arrangement. The decision of the court of appeals thus raises a significant question of law involving, at least in part, the roles of the judiciary and the executive in determining the requirements of military order and our national security.

The effect of the court's holding is far broader than the court's description indicates. Although the court held only that the prior approval requirement is invalid for petitions to members of Congress, it should be clear that complaints and advocacies of all types may be couched in the form of petitions to Congress. The decision in this case thus opens a substantial breach in the regulations. Furthermore, rules of jurisdiction and venue allow any future litigation concerning these regulations to be brought in the District of Columbia.[8] Accordingly, the decision of the court of appeals is, as a practical matter, binding on all United States military bases throughout the world.

1. The prior approval requirement of the challenged regulations does not prohibit or otherwise in-

[8] 28 U.S.C. 1331(a), as amended by the Act of Oct. 21, 1976, Pub. L. No. 94-574, Section 2, 90 Stat. 2721, creates jurisdiction in the district court, without regard to the amount in controversy, whenever the government or one of its employees is sued on a claim arising under federal law. In such cases, 28 U.S.C. 1391(e) provides for venue in the district where one of the defendants resides. In cases challenging military regulations, a defendant residing in the District of Columbia almost always could be named. This case illustrates the effect of Section 1391(e); the dispute involves a base in Japan, yet the controversy was litigated in the District of Columbia because the complaint named the Secretary of the Navy and the Commandant of the Marine Corps as defendants.

terfere with a serviceman's personal, private communications to members of Congress. The regulations address only the distribution of written materials at military facilities. The district court held, nevertheless, that the prior approval requirement is an unconstitutional "prior restraint" on expression (App. B, *infra*, 45a).[9] Although the court of appeals did not reach this constitutional question, it suggested that the question is substantial (App. A, *infra*, 7a-8a and n.13). Because the court of appeals may have been construing 10 U.S.C. 1034 broadly to avoid reaching the constitutional issue, we first discuss that question.

This Court has held that military commanders may restrict collective activity at military installations that interferes with the performance of the military

[9] In *Glines* v. *Wade*, 401 F. Supp. 127 (N.D. Cal. 1975) (appeal pending), and *Allen* v. *Monger*, 404 F. Supp. 1081 (N.D. Cal. 1975) (appeal pending), two other district courts have held these same regulations to be unconstitutional. These courts concluded that the prior approval requirement of the regulations is an unconstitutional "prior restraint" on conduct that is protected by the First Amendment. *Glines* v. *Wade*, *supra*, 401 F. Supp. at 130; *Allen* v. *Monger*, *supra*, 404 F. Supp. at 1090. The courts held that the military need for prior review is "insubstantial" outside of the wartime combat situation. *Glines* v. *Wade*, *supra*, 401 F. Supp. at 130; *Allen* v. *Monger*, *supra*, 404 F. Supp. at 1090. These cases, however, were decided prior to this Court's decision in *Greer* v. *Spock*, 424 U.S. 828 (1976). They also relied, at least in part, on an improper analogy between the prior approval requirement of the challenged regulations and the type of final "prior restraint" on First Amendment activity struck down in *Near* v. *Minnesota*, 283 U.S. 697 (1931), and *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). See note 11, *infra*.

mission or endangers the loyalty or morale of the command. In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld an Army regulation that required the "prior written approval" of the base commander before any person could distribute "any publication" on base. *Id.* at 831. Under the regulation challenged in *Greer* v. *Spock*, the base commander was required to deny permission to distribute written materials where "the dissemination * * * presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation * * *." *Id.* at 831 n.2. The Court dismissed the contention that this restraint on the distribution of written materials at military facilities violates the First Amendment (*id.* at 840; footnote omitted):

> The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical —even unfairly critical—of government policies or officials * * *." There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

The regulations at issue in this case are substantially identical in purpose and effect to the regulation upheld in *Greer* v. *Spock*.[10] The base commander must

[10] The decision in *Greer* v. *Spock* is not distinguishable on the ground that petitions to members of Congress are involved in this case. The regulation upheld in *Spock* required prior approval for the distribution of "handbills, flyers, circulars, pamphlets or other writings" as well as "any publication," *id.* at 831, and was thus plainly broad enough to encompass such petitions. It was applied in *Spock* to prohibit the presidential campaigning of a private person; the campaign was as much part of the political process as the petitions involved in this case.

approve distribution of written materials unless the distribution presents "a clear danger to the loyalty, discipline, or morale" of the affected servicemen, the materials advocate desertion or insubordination, or they materially interfere with the duties or safety of the command. *Greer* v. *Spock* indicates that it is constitutionally permissible for military authorities to proscribe the on-base distribution of written materials that offend these substantial military interests. See also *Parker* v. *Levy*, 417 U.S. 733, 759 (1974). *Greer* v. *Spock* further establishes that a requirement that materials be submitted to the base commander for approval prior to distribution is an appropriate and permissible means of enforcing this proscription. 424 U.S. at 840.[11]

[11] This aspect of the decision in *Greer* v. *Spock* is not inconsistent with "prior restraint" cases such as *Near* v. *Minnesota*, 283 U.S. 697 (1931), and *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). These cases concern the situation where the "prior restraint" is a *final* restraint intended to prohibit the distribution of published materials. The "prior approval" requirement of the regulations challenged in *Greer* v. *Spock* and in this case, however, is only a temporary screening device that is necessary to identify those materials that actually are and permissibly may be finally restrained. See

This Court had often held that persons who work for the government may have speech rights less extensive than those of private citizens, when the difference promotes the effective functioning of governmental services. See *CSC* v. *National Association of Letter Carriers*, 413 U.S. 548, 564-565 (1973); cf. *Kelley* v. *Johnson*, 425 U.S. 238, 245 (1976). *Greer* v. *Spock* applies this principle to military bases, and it governs here as well. The regulations at issue in this case strictly limit the grounds on which commanders can disapprove circulation of petitions. It therefore can be expected that most petitions will be approved for circulation. Moreover, nothing in the regulations restrains personal, private communications with Congress. Accordingly, the regulations raise no serious unsettled constitutional question, and there is no need to construe 10 U.S.C. 1034 to avoid facing the constitutional issue that *Greer* v. *Spock* has settled.

2. The court of appeals concluded that the "prior approval" requirement of the regulations is invalid under 10 U.S.C. 1034 because "no showing has been made that a system of prior restraint on petitioning activities on the Iwakuni Air Station is necessary to the national security" (App. A, *infra*, 16a). The court of appeals did not purport to hold, however, that a screening of petitions prior to distribution at the military base would not *contribute* to the security

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Freedman v. *Maryland*, 380 U.S. 51 (1965) (licensing of motion pictures); *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43 (1961) (same).

of the United States. The court accepted the explanation of military commanders (App. G, *infra*, 58a) that the screening of petitions would contribute to "order and discipline" (App. A, *infra*, 16a), and the court did not dispute that military discipline is significantly related to the security of the nation, see *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The court concluded, however, that "the national security can [not] be said to require that the objective of military discipline be pursued to the exclusion of all other interests" (App. A, *infra*, 16a). The court also stated that the military interest in assuring discipline and order may be protected by post-distribution punishment of servicemen who petition on improper matters. *Id.* at 17a.

There are two critical assumptions underlying the decision of the court of appeals: (1) Congress determined in 10 U.S.C. 1034 that lapses in military discipline, loyalty and morale (and thus in military preparedness) are to be tolerated to provide an unrestricted right to petition; and (2) discipline, loyalty and morale can be maintained by punishment imposed after the distribution of improper materials. These assumptions do not withstand analysis.

First, there is no support in the legislative history of Section 1034 for the court of appeals' assumption that Congress sought to protect on-base petitioning at the expense of the nation's military preparedness. The statute expressly authorizes regulations that are "necessary to the security of the United States." It has always been recognized that military preparedness, and thus the security of the nation, depends on

military loyalty, discipline, and order. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The military must be prepared for immediate action. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). History teaches vividly that the readiness of the armed forces to respond instantly and without internal division when the need occasions is of the utmost importance to our national security whether we are in a state of perceived peace or in a state of declared war.

This concern is of special prominence at a combat-ready advance base such as the Iwakuni Air Station. The base took part in combat and relief activities conducted throughout Southeast Asia in 1972 and 1975. See note 7, *supra*. Moreover, as the affidavit of the former commander of the Iwakuni base states (App. A, *infra*, 29a):

> At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.
>
> Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. * * * The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. * * * These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated.

In determining the extent to which the rule of prior approval contributes significantly to and is thus "necessary to" our national security,[12] the court of appeals gave insufficient weight to the military departments' evaluation of the needs of military loyalty, morale and discipline. See *Parker* v. *Levy*, *supra*, 417 U.S. at 758-759; *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953); *Culver* v. *Secretary of the Air Force*, 559 F.2d 622, 633 (D.C. Cir. 1977) (Leventhal, J., concurring). The determination of the military authorities that the distribution of materials that (i) injure discipline and order, or (ii) counsel disloyalty or desertion, or (iii) interfere with the accomplishment of the military mission, should be restricted to protect our national security is based "in reasoned policy, rather than capriciousness," *ibid.*, and should not have been overturned by the courts below.

Second, the court of appeals' assumption that punishment after the fact would safeguard the national security interest that underlies this regulation is unsupported. The injury to national security occurs when the improper material is distributed and dis-

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[12] The requirement in 10 U.S.C. 1034 that the regulation be "necessary to" the national security cannot be understood to mean that, but for the regulation, the nation would be conquered or compromised. If it were so construed, the statute would constitute what it purports not to be—an absolute prohibition against military regulatory restraints

cipline and morale are lowered, or the military mission is threatened. We do not dispute that, in some circumstances, the prospect of punishment after the fact would discourage servicemen from engaging in improper activity. In at least two circumstances, however, a system of post hoc sanctions would be inadequate unless supplemented by a requirement of prior approval: (1) where a serviceman innocently but incorrectly concludes, without review by the base commander, that the materials are proper for distribution; and (2) where a serviceman determines, despite threatened post-distribution sanctions, to distribute improper materials. The prior approval requirement responds to both of these concerns: (1) it permits the military commander to identify and prohibit distribution of improper materials before any distribution occurs; and (2) it permits immediate action to curtail distribution where approval has been denied or has not been sought. By thus preventing the distribution of improper materials before they can accomplish substantial harm, the prior approval requirement is necessary to the accomplishment of the objectives of the regulation. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Cf. *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 49-50 (1961).[13]

[13] Prior approval requirements in similar military regulations have been upheld on the ground of military necessity by other federal courts. See, *e.g.*, *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). But see note 9, *supra*.

3. The decision of the court of appeals is in error for the additional reason that the language and history of 10 U.S.C. 1034 indicate that it is concerned only with private communications from individual servicemen to members of Congress and not with public circulation of group petitions. The regulations at issue are addressed only to group petitions.

By its terms, 10 U.S.C. 1034 applies to the activity of a "member of an armed force in communicating with a member of Congress * * *." The statute does not mention joint petitioning or other public, collective activity. Moreover, as Judge Tamm pointed out (App. A, *infra*, 24a-25a), the statute was enacted in response to an incident in which an individual sailor was denied permission to communicate with a member of Congress concerning a shipboard grievance. Representative Byrnes, the sponsor of the statute, agreed in discussion on the House floor with Representative Vinson that "the purpose [of the provision is] to permit any man who is inducted to sit down and take a pencil and write to his Congressman or Senator." 97 Cong. Rec. 3775-3777 (1951). See also *id.* at 3883 (Rep. Byrnes); *id.* at 3877 (Rep. Vinson). The Conference Report on the statute also indicates that the focus of the legislation is on individual, rather than collective, communications. H.R. Conf. Rep. No. 535, 82d Cong., 1st Sess. 22 (1951). Nothing in the legislative history of 10 U.S.C. 1034 indicates that Congress intended to protect group activity.[14]

[14] The court of appeals relied solely on a Department of Defense Directive in concluding that Congress intended to pro-

The absence of any congressional reference to group petitioning in 10 U.S.C. 1034 is significant in understanding the congressional intent because, in its enactment of analogous legislation, Congress has been careful to refer to both individual and collective activity. For example, 5 U.S.C. 7102 provides that "[t]he right of [civil service] employees, individually or collectively, to petition Congress or a Member of Congress * * * may not be interfered with or denied." In light of the interference with military discipline, order and preparedness that can result from group petitioning activity, 10 U.S.C. 1034 is best understood as a response to the particular concern that motivated its enactment. The court of appeals erred in reading the statute to apply to public, collective petitions and in reaching a result that renders military authorities powerless to prevent action significantly adverse to the proper and effective functioning of the armed forces.

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tect joint petitioning activity (App. A, *infra*, 12a). The Directive, however, casts no light on this issue. It states only that a serviceman "may petition or present any grievance to any member of Congress" (*ibid.*). The court found significance in the use of the word "petition" in the Directive, concluding that this implies group activity (*ibid.*). But the Department of Defense has never interpreted its Directive in this way—as the regulations at issue here demonstrate. Judge Tamm pointed out that a petition "can be signed either by one person or many persons," and the context of the Directive indicates that the singular sense is intended (*id.* at 25a n.1). At all events, the Directive is no substitute for legislative history.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

Argued Oct. 19, 1977

Decided March 15, 1978

Rehearing and Rehearing En Banc
Denied May 15, 1978

Before MCGOWAN, TAMM and ROBINSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge MCGOWAN.

Opinion filed by Circuit Judge TAMM, concurring in part and dissenting in part.

MCGOWAN, Circuit Judge:

This is an appeal from a judgment of the District Court enjoining the enforcement at the Marine Corps Air Station in Iwakuni, Japan of certain Marine Corps and Navy regulations which require prior approval for the circulation by military personnel of, *inter alia*, petitions to members of Congress. 413 F. Supp. 863 (1976). The District Court declared the

regulations violative of both the first amendment and 10 U.S.C. § 1034 (1970) insofar as they apply to materials distributed on-base during off-hours and away from restricted or work areas. For the reasons appearing herein, and by reference to the statutory, as distinct from the constitutional, ground, we affirm the District Court's judgment insofar as it relates to petitions, and vacate it insofar as it extends to other materials unrelated to the petitioning process.

I

The procedural posture of this appeal is complicated in two respects. We describe them in some detail in order that the precise issue addressed and decided in this opinion may be identified and understood.

The first complication relates to the nature of the attack upon the regulations. This challenge was certified by the District Court as a class action on behalf of all members of the Marine Corps assigned to the Iwakuni Air Station. Each of the three named plaintiffs had sought and largely been denied approval to circulate, on and off-base, petitions and certain related materials. Two of these plaintiffs nevertheless undertook such distribution; both were arrested and one was convicted in a court-martial. On cross-motions for summary judgment, the District Court upheld the regulations as they pertain to off-base distribution of materials in a foreign country, and therefore denied the named plaintiffs' request for injunctive relief relating to the arrests and court-martial for unauthor-

ized off-base distribution.[1] Appellees have not cross-appealed from this portion of the District Court's judgment; and the issue of prior approval for off-base distribution of written materials generally is therefore not before us on this appeal.

However, the District Court did grant declaratory and injunctive relief to both the named plaintiffs and the class with respect to on-base distribution. The Court held that the challenged regulations constitute an unlawful prior restraint upon circulation of materials by service personnel away from restricted areas during off-duty hours. Appellant armed forces officials have conceded, both in the District Court and on this appeal, that the specific requests for on-base distribution made by the named plaintiffs should not have been denied under the applicable regulations.[2]

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[1] The District Court held that because off-base political activity could violate the Status of Forces Agreement between the United States and Japan, which restricts political activities of members of our armed forces in Japan, a system of prior restraint with respect to such activity was reasonable.

[2] The complaint states four instances in which appellees were denied permission to distribute materials on-base. On May 2, 1974, appellee Huff requested permission to solicit signatures on a petition addressed to Senator Cranston, objecting to the use in labor disputes of military and national guard personnel. On May 8, 1974, appellee Falatine requested permission to solicit signatures for a petition to Congressman Dellums, supporting universal and unconditional amnesty for those who resisted the draft or were deserters during the Vietnam war. On May 20, 1974, both these requests were denied on the ground, *inter alia*, that they impugned "by innuendo the motives and conduct of the Commander-in-Chief."

Their petitioning requests having been denied, Huff and Falatine on June 24, 1974, each sought permission to circulate

However, appellants do contest the broad holding that the system of prior restraint imposed by the regulations is itself invalid. Thus, the question presented

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a leaflet entitled "We hold these Truths to be Self-Evident (But Do the Brass?)." The leaflet contained the first amendment and portions of the Declaration of Independence (with "modern interpretation[s]" thereof), and an introductory paragraph which read:

> In two years our country will have its 200th birthday. Many of the basic principles our country was founded upon like the Declaration of Independence and the First Amendment are really "Right On". Yet many of our "superiors" call anyone who tries to exercise his First Amendment right to freedom of speech and press a "communist". They also put down anyone who really believes in our Declaration of Independence which upholds the right of the citizens of any country to change their government when it becomes unresponsive to their needs and the idea that the people of a country should be able to choose their own form of government even if the leaders of our government disagree with their choice.

Huff's request to distribute the leaflet off-base was granted, but Falatine's request for on-base distribution was denied, on the ground that "[t]he introductory paragraph is, by transparent implication, disrespectful and contemptuous of all your superiors, officers, non-commissioned officers and civilians alike."

Finally, on July 30, 1974, appellees Huff, Falatine, and Gabrielson requested permission to distribute a letter to Senator Fulbright, objecting to American support of the regime in South Korea. Huff, Falatine, and three other Marines had been arrested on July 12, 1974 for distributing this same letter off-base without prior approval, and the three July 30 requests sought to distribute a statement concerning the upcoming court-martials of those arrested on July 12, as well as copies of the Fulbright letter itself. Although Huff's and Falatine's requests for on-base distribution were granted, Gabrielson was denied permission to distribute the material in the barracks.

on this appeal is whether the challenged regulations are facially invalid insofar as they require prior approval for off-duty, on-base distribution in non-work areas.

The second complication relates to the particular type of activity upon which the regulations are alleged to be an unlawful prior restraint. The regulations broadly apply to "originat[ing], sign[ing], distribut[ing], circulat[ing] or promulgat[ing] petitions, publications . . . pamphlets, newspapers, magazines, handbills, flyers or other similar printed or written material,"[3] and the District Court's order applies with equal breadth to any distribution of any material in the on-base context heretofore described. However, we believe that this appeal can and should be resolved by reference only to that activity which is the focal point of both the regulations and the requests made by the named plaintiffs, namely, petitioning by servicemen of members of Congress.

Petitions are the first type of material mentioned in the regulations, and petitions are the only type of material to which all the activities proscribed (originating, signing, distributing, circulating and promulgating) can literally apply. Three of the four requests for permission to distribute on-base described in the complaint directly involved petitions to members of Congress.[4] The fourth request as well appears to

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[3] *See* text accompanying note 11 *infra*.

[4] The material sought to be distributed by appellee Gabrielson included both a letter to a congressman and a statement concerning arrests of other Marines for previously distributing the letter without prior approval. *See* note 2 *supra*.

have borne a close and clearly derivative relationship to these frustrated petitioning efforts. That request —to distribute a leaflet quoting the first amendment and portions of the Declaration of Independence—was made by two appellees who had each shortly before been denied permission to circulate petitions. The "modern interpretation" of the first amendment contained in the leaflet included the statement that "the government cannot take away our right to circulate petitions," and the title of the leaflet and introductory paragraph indicate that its purpose was to declare the view that commanding officers, who had denied the requests, were not acting consistently with the principles of the first amendment and the Declaration of Independence. *See* note 2 *supra.*

The causal connection between the initial unsuccessful attempts to circulate petitions, on the one hand, and the subsequent request to distribute the Declaration of Independence, on the other, is even more apparent when one considers that a principal grievance stated in the Declaration itself was that

> [i]n every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.

The Signers of the Declaration felt compelled to state their grievances to the world after those in authority rebuffed their petitions and other efforts to resolve those grievances. Appellees in this case, blocked in their attempts to petition the Congress, sought in aid of those attempts to point out that refusal to allow

such petitions appeared to violate the principles stated in the Declaration.[5]

Thus we consider that the record illuminates in concrete factual terms only the question of the validity of the regulations as they pertain to activity directed towards the petitioning of Congress. Finding, as we do, that prior restraint in such a case is at odds with the statutory command of Congress, we believe the essential grievance suffered in this case is met by limiting declaratory and injunctive relief to the petitioning context. The availability of such relief always resides in the sound discretion of the court,[6] and we see neither the necessity nor the desirability of reaching on this record the question of the facial validity of the regulations with respect to materials other than petitions to Congress.

II.

The four challenged regulations, all of which have the same operative language, differ only in the scope of the geographic area to which they apply. Thus, the regulations are in the form of a Pacific Fleet Instruction,[7] a Fleet Marine Force Pacific Order,[8] a First Marine Aircraft Wing Order,[9] and a Iwakuni

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[5] *See* note 2 *supra.*

[6] *See Great Lakes Co.* v. *Huffman,* 319 U.S. 293, 299-300, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. VI 1976).

[7] CINCPACFLTINST 5440.3c (1974).

[8] FMFO 5370.3 (1974).

[9] MAWO 5370.1A (1973).

Marine Corps Air Station order.[10] The operative language states that Marine Corps personnel within the relevant command area shall not

> originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.[11]

This requirement clearly constitutes a prior restraint upon petitions to Congress. Indeed, the requirement of command authorization is interposed at every stage of the petitioning process, from drafting the document to circulating it to signing it.[12]

Were we considering the validity of this restraint under the first amendment, the next step in that consideration would be to examine the standards which guide commanders in deciding whether to authorize petitioning activities. In the civilian context the standards would have to be narrow, objective, and definite, *see Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), and there would be "a heavy presumption against

[10] MCASO 5370.3A (1973).

[11] FMPO 5370.3 (1974).

[12] In October of 1974, MAWO 5370.1A and MCASO 5370.3A were altered slightly to exclude the term "originate."

[the] constitutional validity" of the system of censorship implemented by the challenged regulations. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975). However, "the different character of the military community and of the military mission . . . may render permissible within the military that which would be constitutionally impermissible outside it," *Parker* v. *Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974). Under this more lenient constitutional standard applicable to restrictions on first amendment rights within the military sphere, the presumption against prior restraints would not be as great as it is in the civilian context; and we would be required to undertake a careful balancing of competing first amendment interests and military requirements.

Although the District Court in this instance, and other courts presented with the same issue as that raised on this appeal,[13] have undertaken the foregoing

[13] *Allen* v. *Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975) (Peckham, J.), *appeal pending*, 9th Cir. No. 76-125; *Glines* v. *Wade*, 401 F.Supp. 127 (N.D. Cal. 1975) (Orrick, J.) *appeal pending*, 9th Cir. No. 76-1412. Both these decisions found the challenged regulations invalid on constitutional and statutory grounds, both facially and as applied. The only other decision which has directly passed upon the validity of prior restrictions on petitioning activity is *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). This court there upheld the regulations as applied in that case, which involved combat zone bases during the Vietnam war. However, the court did note that it "entertain[ed] significant doubts" about the facial validity of the regulations, *id.* at 325, 511 F.2d at 1333.

first amendment analysis, we believe that it is neither necessary nor proper to do so because the validity of the challenged regulations, insofar as they pertain to petitioning activities, can be determined on statutory grounds.

10 U.S.C. § 1034 (1970) provides that

> [n]o person may restrict any member of an armed force from communicating with a member of Congress, unless the communication is unlawful or violates regulations necessary to the security of the United States.

In enacting this statute, Congress has eased the task of the courts in evaluating the validity of military restrictions on the right to petition. The statute not only indicates that free and unrestricted communication by members of the armed forces with the Congress or members thereof is of particular concern to the legislative branch, but also commands that such communication be subject to additional protection beyond that afforded other kinds of speech by the first amendment. Whatever standards may be held to apply generally to restrictions on speech within the military, the standards to be applied to restrictions on petitioning and related activity cannot be less stringent than those provided in § 1034. Thus, the statute represents a legislative evaluation of the competing interest in free expression of views to members of Congress, on the one hand, and the special requirements of the military, on the other. The difficult balancing which would otherwise have to be accomplished by the judiciary has been legislatively resolved: re-

strictions imposed upon lawful communication to Congress must be "necessary" to the national security.

The regulations involved in this case constitute in terms restrictions on communications with members of Congress. The legislative history of § 1034 confirms that Congress sought by this legislation to prohibit military commanders from interfering with communications to members of Congress *in advance* of the actual sending of the communications.[14] A system of prior restraint—as opposed, for instance, to the *post hoc* imposition of penalties for scurrilous, obscene, mendacious, or other improper communications—is precisely what Congress intended to prohibit, subject to the limited exceptions noted in the statute.

The Government contends, however, that the statute quoted above was intended to protect only letters

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[14] The provision was originally enacted in 1951 as an amendment to the Universal Military Training and Service Act. C. 144, § 1(d), 65 Stat. 78. The amendment was offered by Congressman Byrnes of Wisconsin in order to counteract military regulations which required that communications to Congress be sent "through official channels." In support of his amendment, Congressman Byrnes stated:

> I will admit . . . that there is no restriction on [the] right to send communications through channels, but anybody knows that that certainly is a restriction in and of itself.

97 Cong. Rec. p. 3776, April 12, 1951. Minor changes in wording were made when the statute was recodified in 1956. C. 1041, 70A Stat. 80.

by individuals to members of Congress.[15] We think the legislative history indeed leaves no doubt that the right to present a solitary, individual grievance to a member of Congress is encompassed by § 1034.[16] But there is no indication that this is the outer limit of the communication which Congress sought to protect in passing this legislation. We agree with the Secretary of Defense that § 1034 protects also the right to *petition* members of Congress. In a Directive entitled "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," he stated:

> The right of members to complain and request redress of grievances against actions of their commander is protected by Article 138 of the Uniform Code of Military Justice. *In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. § 1034).*

D.O.D. Directive No. 1325.6, § III G (1969) (emphasis added). We would suppose that quite often a

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[15] The opinion in *Carlson* v. *Schlesinger, supra,* 167 U.S. App.D.C. 325, 511 F.2d at 1333, may also have intimated that § 1034 protects only the right to send individual letters to Congress. While the "national security" exception to the statute may narrow the nature of petitioning activities protected in a combat zone such as was involved in *Carlson,* we do not think and do not read the dicta in *Carlson* as implying that individual letter-writing is the only activity protected under § 1034 at a base such as Iwakuni.

[16] When asked whether the purpose of the amendment was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator," the sponsor of the amendment replied, "That is right." 97 Cong. Rec. p. 3776, April 12, 1951.

soldier's intended communication with Congress could not effectively be accomplished through solitary letters, as, for instance, when the objective is to communicate widespread dissatisfaction concerning a particular grievance, rather than merely the grievance itself. We also note that the system of prior restraint at issue in this case evidently applies not only to petitions but also to their next of kin, coordinated mailing campaigns utilizing preprinted forms or letters containing identical messages. The distribution of such material would appear to be subject to prior approval.

Particularly in view of the long and cherished tradition in this country, embodied in the first amendment (". . . the right *of the people peaceably to assemble, and to petition Congress* for a redress of grievances"), of collective presentation of grievances to those in authority in the form of petitions, we think it most unlikely that in protecting the right to communicate grievances to Congress, Congress did not intend to protect the right to solicit others to sign such communications.

Having concluded that the petitioning activities restricted in this instance by the challenged regulations are communications to members of Congress within the meaning of § 1034, our next task is to determine whether the system of prior restraint at issue falls within one of the exceptions to the general prohibition of that statute. It is not seriously contended that the materials in issue here were "unlawful," within the meaning of that term as used in § 1034, by reason

of their particular content. The statute also states, however, that prior restraint is not prohibited where the communication thus restricted "violates regulations necessary to the security of the United States." Thus the question we face is whether the regulations requiring prior approval of petitions to Congress on the Iwakuni Air Station are necessary to the security of the United States.

We note that this is not the way that courts in the two other cases involving the facial validity of similar military restrictions on petitions have framed the statutory question before them.[17] Rather than determining whether the system of prior restraint in the particular circumstances before them is within the national security exception to § 1034, these courts have measured the standard of "national security" against the guidelines which armed forces personnel have set down to guide commanding officers in granting or denying requests to distribute. In both this case and the other two cases concerning restraints on petitioning activities, the guidelines essentially state that permission to distribute should be denied if the petition at issue presents "a clear danger to the loy-

[17] *See Allen* v. *Monger, supra* 404 F.Supp. at 1090 (¶ 8); *Glines* v. *Wade, supra* 401 F.Supp. at 130-31. The District Court, however, properly phrased the question as whether "the very system of prior restraints . . . is unconstitutionally restrictive of First Amendment freedoms." 413 F.Supp. at 868.

alty, discipline, morale or safety" of service personnel, or if it advocates unlawful behavior.[18]

The holdings in the other two cases that these guidelines are broader than the statutory national security exception address a question which, in our view, need not be reached. The particular guidelines which armed forces personnel have set down to guide commanding officers in granting or denying requests to distribute assume relevance only if it is first determined that the basic system of prior approval for any petitioning activity is itself "necessary to the security of the United States." *If* this determination were affirmative, *then* we would face the issue of whether the standards set out in the guidelines for rejection of requests are also commensurate with the statutory

[18] Commanders are told to deny permission to distribute if such distribution would

> (1) Materially interfere with the safety, operation, command or control of his unit, or the assigned duties of particular members of the command; or,
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> (2) Present a clear danger to the loyalty, discipline, morale or safety to personnel of his command; or,
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates, insubordination, disloyalty, mutiny, refusal of duty, solicits pornographic material, or comprises, advocates, or solicits violation of international treaties or agreements; or,
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

MAWO 5370.1A. Nearly identical guidelines are stated in the other regulations challenged on this appeal. *See also Allen* v. *Monger, supra* 404 F.Supp. at 1086 (¶ 10); *Glines* v. *Wade, supra* 401 F.Supp. at 131.

standard. Refusal to grant a request to distribute is a *second, separate* restriction in addition to the universally applicable restriction which takes the form of a system of prior restraint. We emphasize again that when Congress prohibited restrictions on communications with Congress, it clearly intended this prohibition to apply to a system of prior approval itself.

We conclude that no showing has been made that a system of prior restraint on petitioning activities on the Iwakuni Air Station is necessary to the national security. The findings of the District Court with respect to the nature of the military mission at the base are not extensive, but it is clear that the station is not in an actual and current combat zone. While an affidavit introduced in the Court below states that the base is "combat-ready," there are no combat activities performed by base personnel during peacetime.[19] We understand that order and discipline might be more tightly maintained were commanders given the opportunity to screen petitions prior to their circulation, but we do not think that the national security can be said to require that the objective of military discipline be pursued to the exclusion of all other interests. If this were the case, then § 1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline. We agree with the District Court that as long

[19] *See* 413 F.Supp. at 867-68.

as the on-base petitioning activity is performed away from restricted or work areas during off-duty hours, there should be no prior approval required for these activities because such approval is not "necessary to the national security."

Our invalidation of the system of prior restraint on petitions to Congress at the Iwakuni Air Station does not leave military commanders without recourse against service personnel who initiate petitions which prove to be improper in their content. *See* p. —— of —— U.S.App.D.C., p. 912 of 575 F.2d supra. Those who undertake such petitioning may be punished under applicable provisions of the Code of Military Justice or under applicable criminal law. It is the system of prior restraint on petitions to Congress which is incompatible with § 1034.

III

The Government has strenuously argued that this case is controlled by the Supreme Court's decision in *Greer* v. *Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed. 2d 505 (1976). We respond to this argument at some length because we think it is based on important misconceptions about the scope of the holdings in that case. The major portion of the *Greer* opinion related to the holding that the absolute ban on political demonstrations at Fort Dix, New Jersey was constitutionally permissible, a holding not directly relevant to the statutory issue before us relating to the petitioning Congress. However, *Greer* also held that the first amendment rights of the civilian plaintiffs were

not violated by another regulation which prohibited them from distributing political campaign literature at the base without prior command approval. Because the plaintiffs in *Greer* had not presented their literature for prior approval, the Court did not face the issue of whether the regulation was constitutional as applied; rather, the Court held that the challenged regulation was not facially invalid, *id.* at 838-840, 96 S.Ct. 1211.

The regulation in *Greer* authorizing prior restraint read as follows:

> The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person . . . is prohibited on the Fort Dix Military Reservation without prior approval . . . .

Id. at 831, 96 S.Ct. at 1214. The quidelines governing command refusal of requests to distribute were in all relevant aspects identical to those in the case before us, *see id.* at 831, 96 S.Ct. 1211 n. 2.

We find *Greer* neither controlling nor persuasive with respect to the issue of the validity of the regulations implementing a system of prior restraint on petitions at the Iwakuni Air Station. Most significantly, of course, the holding in *Greer* was constitutionally based. The *Greer* Court had no occasion to consider the validity of that prior restraint regulation under § 1034 because petitions to Congress were not involved in *Greer*. The Court's statement that "nothing in the *Constitution* . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command," *id.* at 840, 96 S.Ct. at 1218 (emphasis added),[20] is therefore fully consistent with our conclusion that prior restraints on all petitioning activities at a base such as Iwakuni is violative of § 1034.

Moreover, even apart from the fact that the decision we now make is statutorily based, the above-quoted statement is consistent with our holding because, as earlier noted, commanders remain free to punish—and thus deter—petitioning activities which are unlawful or otherwise inconsistent with the military mission. We have held only that at a base such as Iwakuni commanders are not free to use a system of prior restraints to inhibit such activities; they remain free to do so in other ways.[21]

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[20] It may be that this statement is not even the basis for the holding of constitutional validity. In *Greer* those who sought to distribute materials were civilians, and the Court cited the "historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command" (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)) in concluding that "respondents, therefore, had no generalized constitutional right to . . . distribute leaflets at Fort Dix." *Greer* v. *Spock*, 424 U.S. at 838, 96 S.Ct. at 1217.

[21] Elsewhere in its opinion, the *Greer* Court was at pains to stress the particular need for discipline at a basic training camp such as Fort Dix. It may well be that this need is sufficient to allow a general system of prior restraints which would be unconstitutional at a base such as Iwakuni. *Cf.* note 15 *supra*.

We also note that, even if we were to decide the issue before us on constitutional grounds, it is not clear that *Greer* would be controlling. Careful study of the regulation at issue in *Greer* leaves uncertain the question of whether or to what extent it in fact restricts petitioning activities. Although petitions could conceivably be encompassed within the term "other writings," it is not at all clear that solicitation of signatures is encompassed by the specific activities proscribed: "distribution" or "posting." In any event, the *Greer* regulation is obviously not directed at petitioning activities in the significant way that the regulations in this case are. The Supreme Court has previously enunciated the judgment that a statute should not be struck down as facially invalid simply because it potentially touches upon constitutionally protected activity at the margin. *Parker* v. *Levy*, *supra* 417 U.S. at 760, 94 S.Ct. 2547. Thus the Court's decision to uphold the regulation in *Greer* need not imply that the regulation would be constitutional if applied to petitioning activities.

Section 1034 is an exercise by Congress of its constitutional power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S.Const. art. I, § 8, cl. 14. In doing so Congress may, of course, elect to provide rights and privileges extending beyond those minimally guaranteed by the Constitution. Whatever the reach of that guarantee may be in a base of this kind, it is plainly evident that Congress in enacting § 1034 has been motivated by a purpose to strengthen, and not to limit, the first

amendment rights of petition in the case of service personnel. It is, in any event, the statutory standard to which we look in determining the validity of the service regulations challenged in this case; and we find these regulations wanting insofar as they deal with petitioning activity directed to members of Congress.

We remand the case to the District Court with directions to revise its judgment in the manner indicated herein.

It is so ordered.

TAMM, Circuit Judge, concurring in part and dissenting in part:

I concur in Judge McGowan's well-written and very careful opinion insofar as it vacates the portion of the district court's judgment that extends to materials unrelated to the petitioning process. However, because I am unable to agree with the conclusions and result he reaches concerning multi-signature petitions addressed to Congress by members of the armed forces, I must respectfully dissent from that part of his opinion.

I

By exercising an appropriate degree of judicial restraint, Judge McGowan has written a very narrow opinion based solely on statutory grounds. The result he reaches follows from two conclusions: first, that a petition, signed by more than one individual, addressed to a senator or representative by a member of the armed forces, is a protected communication under 10 U.S.C. § 1034 (1970); and second, assuming such a petition is protected, that regulations requiring prior approval of the petition by appropriate military authority are not necessary to the security of the United States. I disagree with both of these conclusions. Prior to commenting on them, however, a few preliminary remarks are in order.

We must not lose sight of the fact that this case arises from events that occurred in a purely military environment. Both the Congress and the Supreme Court have long recognized that "the military is, by

necessity, a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974); *see Orloff* v. *Willoughby*, 345 U.S. 83, 94, 73 S.Ct. 534, 97 L.Ed. 842 (1953). For example, the Congress has made it a felony to urge or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the armed forces. *See* 18 U.S.C. §§ 2387-2388 (1970). Similarly, the Court has often indicated its awareness of the military's need for "a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757, 95 S.Ct. 1300, 1330, 43 L.Ed.2d 591 (1975); *see Greer* v. *Spock*, 424 U.S. 828, 848, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (Powell, J., concurring); *Burns* v. *Wilson*, 346 U.S. 137, 140, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) (plurality opinion). I mention these well-accepted propositions to illustrate my belief that legislative and judicial actions that seek to limit a military commander's disciplinary prerogatives should be only as intrusive as is necessary to accomplish the effect desired.

II

Consistent with the foregoing premise, I believe that laws affecting military discipline should be interpreted as narrowly as possible, because an expansive reading of such statutes may circumscribe the authority of military commanders to an extent never intended by Congress. In my opinion, the court's conclusion in this case that petitions are protected com-

munications under 10 U.S.C. § 1034 clearly goes beyond what Congress intended when it passed that statute.

An objective reading of the legislative history demonstrates that the *sole* purpose in enacting 10 U.S.C. § 1034 was to ensure that an *individual* member of the military could, at any time, write to his senators or representative without being required to have the communication proceed through command channels. The sponsor of the amendment, Congressman Byrnes of Wisconsin, introduced the measure because of an incident in which an *individual* sailor desired to communicate with Mr. Byrnes about a personal grievance and was "told by his commanding officer aboard ship that a direct communication with his Congressman was prohibited and it would make him subject to a court-martial." 97 Cong.Rec. 3776 (1951). As the majority notes, in a somewhat offhand fashion, *see* Majority opinion, *supra* at —— of ——U.S.App.D.C., at 912 of 575 F.2d n.16, when Mr. Byrnes was asked whether "the purpose [of the amendment was] 'to permit *any man* who is inducted to sit down and take a pencil and paper and write to *his* Congressman or Senator'," he replied, "That is right." 97 Cong. Rec. 3776 (emphasis added). Later, the chairman of the committee responsible for the legislation, Mr. Vinson of Georgia, reiterated that the amendment was intended "to let *every man* in the armed services have the privilege of writing *his* Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret

matter." *Id.* at 3877 (emphasis added). If one construes the statute strictly, therefore, as it most certainly ought to be construed, it is apparent that individual communications with senators or representatives were indeed intended to be "the outer limit of the communication which Congress sought to protect in passing this legislation." *See* Majority opinion, *supra* at —— of —— U.S.App.D.C., at 912 of 575 F.2d; *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327, 1333 (1975).[1]

The soundness of this conclusion is even more apparent when one considers a directly analogous statute, enacted almost forty years *before* 10 U.S.C. § 1034, which illustrates that Congress had no difficulty in employing unequivocal language when it did intend that multi-signature petitions be included within the protective ambit of a statute. Entitled "Right to *petition* Congress; employees," 5 U.S.C. § 7102 (1976) states (emphasis added): "The right of [civil service] employees, *individually or collectively, to petition Congress* or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." Section 1034, on the other hand, makes no mention of the key words "petition"

[1] This construction of 10 U.S.C. § 1034 is entirely consistent with DOD Directive No. 1325.6 § III G (1969), Joint Appendix (J.A.) at 65-69. A petition can be signed either by one person or by many persons. The wording of the directive (emphasis added)—"*a member may petition* or present any grievance to any member of Congress . . ."—indicates that "petition" is being used in the singular sense in that document.

or "collectively," and I hardly think that we should read into that statute something Congress clearly did not intend to be included.

The wisdom of Congress in not extending the protection afforded to petitions by civil service employees to petitions by members of the military is evident. The overt acts required to generate a petition, while only mildly disruptive to the tasks performed by civil service employees if done during off-duty hours, could be very harmful to military discipline and morale. In this case, appellees desired to canvass virtually every off-duty area of the base—including barracks, the base exchange, and the enlisted men's club [2]—in an effort to gain support for their petitions. I find it difficult to believe that Congress intended the narrow language of 10 U.S.C. § 1034 to afford blanket protection to these activities, since such protection necessarily strips the local commander of even the very limited right of prior review sought by the regulations under scrutiny here.

III

Even assuming *arguendo* that multi-signature petitions are covered by 10 U.S.C. § 1034, I disagree with the conclusion that the regulations that provide for a system of prior review of petitioning activities on the Iwakuni Air Station are not "necessary to the security of the United States." The linchpin of the majority's argument in favor of this conclusion is that

[2] J.A. at 4; Record entry 17, at 5.

the Iwakuni Air Station is "not in an actual and current combat zone," [3] as was the case in *Carlson* v. *Schlesinger*. It also appears that the majority would have been more sympathetic to the regulations had they been applied at a "basic training camp," as in *Greer* v. *Spock*.[4] I find these distinctions to be untenable.

Our first President, who was intimately familiar with the horrors of armed conflict, once remarked that the most effective means of securing peace is to be prepared for war. This same theme was echoed by the Supreme Court in *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955) (emphasis added): "[I]t is the primary business of armies and navies to fight *or be ready to fight* wars should the occasion arise." The Congress, too, has recognized the inseparability of the military's responsibility both to wage and to be prepared to wage wars, by imposing similar sanctions on those who attempt to cause insubordination by members of the military whether during peacetime or during war. *Compare* 18 U.S.C. § 2387 (1970) *with id.* § 2388.

An affidavit submitted in the district court by a former commanding general at Iwakuni [5] indicates

[3] Majority opinion at —— of —— U.S.App.D.C., at 914 of 575 F.2d; *see* Memorandum opinion of May 21, 1976, J.A. at 83.

[4] Majority opinion at —— of —— U.S.App.D.C., at 915 of 575 F.2d n.21.

[5] J.A. at 70-74. The district judge's characterization of this document as a "post hoc" rationalization, J.A. at 83 n.12, is

that the regulations under scrutiny in this case were promulgated with one goal in mind: to assist the local commander in accomplishing his assigned mission of having his command prepared to react immediately or on very short notice, a mission we have previously denominated as "a strong national interest." *Hess* v. *Schlesinger*, 159 U.S.App.D.C 51, 486 F.2d 1311, 1312 (1973). I quote at length from this affidavit to illustrate how little difference there is between being stationed at Tan Son Nhut Air Base in Vietnam in 1971, as in *Carlson*, and being stationed at Iwakuni Air Station in Japan, either today, or in 1974 when the relevant actions commenced:

> The First Marine Aircraft Wing, its personnel and equipment, is constantly maintained in a high degree of readiness for possible combat deployment on extremely short notice. For example, in early 1972, units of the First Marine Aircraft Wing stationed at Iwakuni, deployed to

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very puzzling and somewhat troubling. At the time of the affidavit, the affiant had been in the Marine Corps for 35 years, had commanded Iwakuni Air Station for over a year just two years before, and was serving as Chief of Staff of the Marine Corps. It is hard to imagine anyone more qualified to set forth matters of significant value to the trier of fact, and yet it is obvious that the affidavit was accorded little, if any, weight by the judge below. The case cited in support of this approach, *Hess* v. *Schlesinger*, 159 U.S.App.D.C. 51, 486 F.2d 1311 (1973), is hardly apposite. Indeed, the affidavits in *Hess* were found to be insufficient to support a summary judgments precisely because military *lawyers* rather than military *commanders* were making judgments concerning the efficiency of units at Iwakuni in certain deployment scenarios. That deficiency is not present in the instant case.

> combat bases in Vietnam and Thailand within 24 hours of receiving notice. Later, during the spring of 1975, elements of the First Marine Aircraft Wing were rapidly deployed to assist in the evacuation of Phnom Penh and Saigon. At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.
>
> Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. A well-trained and disciplined Marine, when considering the mission of the supporting units, must be prepared for instantaneous deployment for such contingency operations, ranging from protection/evacuation to combat operations. The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. . . . These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated. Therefore, the regulations under challenge in this lawsuit, which afford a Commander the ability and authorization to screen such printed material prior to its distribution, are in keeping with the

requirement for the safety and well-being of his troops.[6]

These comments, and those previously cited sentiments of support from all three branches of government, convince me that those regulations establishing a system of prior review of petitioning activities at Iwakuni most certainly are "necessary to the security of the United States." Only the local commander has the ability and expertise necessary to assess the effect of such activities on the combat readiness of his command, *see Schneider* v. *Laird*, 453 F.2d 345, 347 (9th Cir. 1972) (per curiam); *Yahr* v. *Resor*, 431 F.2d 690, 691 (4th Cir. 1970) (4th Cir. 1970) (per curiam), and thus a *limited* right of prior review should be left to him. I stress the word "limited," for, as noted by the majority, the Government has conceded that the military authorities acted improperly in denying the requests in issue here. Thus, in future cases, only those very few petitioning activities that are beyond this rather high threshold would be subject to circumscription.[7] Rather than totally usurping

[6] J.A. at 73-74.

[7] I believe that DOD Directive No. 1325.6, *supra* note 1, and regulations promulgated thereunder, J.A. at 51, 54, 58 & 61-62, furnish the proper standard to be employed by the local commander:

> It is the mission of the Department of Defense to safeguard the security of the United States. *The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security.* On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

J.A. at 65 (emphasis added). *See also id.* at 52; Majority opinion at ——-—— of —— U.S.App.D.C., at 913-914 of 575 F.2d & n.18.

The presumption *against* prohibition of petitioning activities in made even stronger by provisions of the implementing regulations that require a commander who prohibits such activities to report this fact immediately to his superior officers. *See* J.A. at 60, 63. *See also id.* at 64. Since any of these superiors has the authority to reverse the commander's prohibition decision, there thus exists a further safeguard against arbitrary application of the regulations. *See Greer* v. *Spock*, 424 U.S. 828, 831-32 n.2, 840, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

[8] The suggestion by the majority that post hoc legal action leaves the commander with a means to deter petitioning activities that are unlawful or otherwise inconsistent with the military mission is unpersuasive. Majority opinion at ——, ——, ——-—— of —— U.S.App.D.C., at 912, 914, 915 of 575 F.2d. If a petitioning activity is indeed punishable, the harm to the unit's mission will have been done before legal proceedings can be instituted, and long before the proceedings are completed. Given the quick-reaction nature of the Iwakuni mission, a legal recourse alternative is of little practical value to the commander.

the local commander's authority in this regard, as the majority opinion has done,[8] I would prefer to repose confidence in the commander to review petitions in a reasonable and fair manner; this proposition is simply a corollary to that which expresses confidence in him to do his part in securing our Nation.

IV

In summary, I would hold that multi-signature petitions are not protected communications under 10

U.S.C. § 1034, and, alternatively, that the regulations in issue here are proper because they are necessary to the security of the United States. In so holding, we would properly honor "the sound and established principle that it is not the business of the courts to run the military." *Vander-Molen* v. *Stetson*, —— U.S.App.D.C. ——, ——, 571 F.2d 617, 629 (1977) (Robb, J., dissenting). I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 75-0043

FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

May 21, 1976

MEMORANDUM OPINION

PARKER, District Judge.

This proceeding presents questions for judicial determination regarding the limit and scope of constitutional rights afforded to members of the military, a subject which the courts have frequently considered in recent years. Here, three individual plaintiffs, on behalf of themselves and other members of the Marine Corps stationed at, assigned to or on duty at the Marine Corps Air Station at Iwakuni, Japan, challenge certain regulations which require prior command approval for distribution of written material by military personnel. They seek declaratory and injunctive relief against the Secretary of the Navy and certain military officers with respect to the implementation and enforcement of the regulations.

The Court is called upon to resolve cross-motions for summary judgment and, having considered the

memoranda of counsel, affidavits, exhibits, oral argument, and the entire record, concludes that plaintiffs' motion should be granted in part and denied in part, for the reasons which follow.

First Amendment in the Military

In *Parker* v. *Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), the Supreme Court left no doubt as to the guiding principle to be observed:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it. 417 U.S. at 758, 94 S.Ct. at 2563, 41 L.Ed.2d at 459.

Despite the tone of this oft-quoted passage, many jurists have questioned this generaliaztion and have taken the view that the mandates of the Constitution are fully applicable to the military, and would place the burden of justification upon those attempting to restrict freedom of expression. As Supreme Court Justice William J. Brennan recently noted:

> . . . the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. . . . In all cases where such interests have been advanced, the inquiry has been whether the exercise of First Amendment rights necessarily must be circumscribed in order to secure those interests. *Greer* v. *Spock*, —— U.S. ——, 96 S.Ct. 1211, 1224, 47 L.Ed.2d 505, 523, 44 U.S.L.W. 4380, 4388 (1976) (Brennan, J., dissenting).

The view that an assertion of constitutional rights is a threat to discipline and morale in the military has been sharply questioned. Perhaps encouragement of more freedom of thought would have sparked recognition of unlawful orders in the Vietnam War, and prevented atrocities such as the massacre of civilians at My Lai. Scientific studies have also pointed out that too much discipline among service personnel can lead to increased susceptibility to brainwashing techniques while in captivity.[1] The military, too, are members of the American society where freedom of expression is a key value, and they are fully capable of reconciling a dissenting personal viewpoint with a duty to obey the law. This was clearly recognized by Chief Judge David Bazelon when he wrote:

> . . . soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means. *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327, 1337 (1975) (Bazelon, dissenting).

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[1] Note, "Military Discipline and Political Expression: A New Look at an Old Bugbear," 6 *Harv.Civ.Rights-Civ.Lib.L. Rev.* 525, 541 (1971).

Thus, in examining the facts and issues in this proceeding, the Court will assume that constitutionally guaranteed liberties are to be respected, unless there is a demonstrated need which justified military restrictions on free expression.

Factual Background

The plaintiffs Frank L. Huff, Robert A. Falatine, and Robert E. Gabrielson allege that while stationed at the Marine Corps Air Station, Iwakuni, Japan, they were unlawfully denied permission to circulate petitions to Congress and to distribute certain printed material, both on and off base. Early in the proceedings the matter was certified as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan." [2]

The plaintiffs' purpose in bringing this class action was to challenge the validity of the regulations which required them to obtain permission to distribute the written materials in question. The questioned regulations [3] provide in pertinent part as follows:

> 5.2(2) No member of this command will originate, sign, distribute, or promulgate petitions,

[2] Order filed July 17, 1975, pursuant to Rule 23(a) Fed.R. Civ.P.

[3] First Marine Aircraft Wing Order 5370.1A, replaced by 5370.1B and Marine Corps Air Station (Iwakuni, Japan) Order 5370.3A, replaced by 5370.3B; Fleet Marine Force Pacific Order 5370.3 and Commander-In-Chief, Pacific Fleet Instruction 5440.3C, all of which contain essentially the same provisions.

> publications, including pamphlets, newspapers, magazines, handbills, fliers, or other similar printed or written materials on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or aboard any military installation, while in a duty status or non duty status, in uniform or out of uniform, or anywhere within a foreign country, regardless of uniform or duty status unless prior command approval is obtained. 5.c. . . . Commanders will control or prohibit the unauthorized activities described, if, in their judgment activity would,
>
> (1) Materially interfere with the safety operation, command or control of his unit, or the assigned duties of particular members of the command; or,
>
> (2) Present a clear danger to the loyalty, discipline, morale or safety to personnel of his command; or,
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits pornographic material, or comprises, advocates, or solicits violation of international treaties or agreements; or,
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

(hereinafter "the regulations").

The defendants are the Secretary of the Navy and military officers [4] responsible for prescribing and administering the regulations.

[4] Commandant of the Marine Corps, Commander-in-Chief U.S. Pacific Fleet, Commanding General Fleet Marine Force

Plaintiffs seek by this action: (1) a declaration that the regulations are unconstitutional on their face or as applied in violation of the First and Fifth Amendments to the United States Constitution, 10 U.S.C. § 1034 [5] and pertinent Marine Corps guidelines (hereafter "guidelines"); [6] (2) an injunction and mandamus order restraining defendants from continuing to deny plaintiffs their rights; and (3) invalidation and expungement of plaintiff Huff's conviction and plaintiff Falatine's arrest for violating said regulations, and restoration of all pay, benefits and rank of which Huff was deprived as a result of said conviction.

Specific Actions Taken Against The Individual Plaintiffs

Their complaint revolves around four specific denials of requests to circulate written materials and one incident where two of the plaintiffs were arrested for circulating a letter without requesting approval.

Pacific, Commanding General First Marine Aircraft Wing and Commanding Officer U.S. Marine Corps Air Station.

[5] The text of 10 U.S.C. § 1034 in its entirety reads as follows:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

[6] Department of Defense Directives 1325.6 and 1344.10; OPNAV Instruction 1620.1 and MCO 5370.4. The basic policy expressed in the guidelines is that "the service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security." DOD Directive 1325.6, Part II.

On May 2, 1974, plaintiff Huff requested permission to distribute both on and off base, a petition to Senator Alan Cranston regarding the use of members of the military and the National Guard in labor disputes, and copies of an article on the use of Article 138 of the Uniform Code of Military Justice.[7] Permission was denied by the Commanding General, on the basis that the petition contained "gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces in the exercise of his constitutional responsibilities."

On May 8, 1974, plaintiff Falatine requested permission to distribute for signatures a petition, either on or off base, to Congressman Ronald Dellums supporting amnesty for Vietnam War resisters. His requests were denied for the same reasons the Huff request was denied.

On June 24, 1974, both Falatine and Huff requested permission to circulate copies of a leaflet entitled "We Hold These Truths To Be Self-Evident (But Do the Brass?)" containing the Declaration of Independence and the First Amendment to the Constitution, with commentary. Huff requested permission to distribute the leaflet off-base while Falatine's request was for on-base circulation. Huff's off-base request was granted, but Falatine's on-base proposal was denied because the leaflet's introductory paragraph was

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[7] Article 138, 10 U.S.C. § 938, provides for the filing of complaints by armed forces personnel against a commanding officer.

deemed to be "by transparent implication, disrespectful and contemptuous of all of your superiors, officers, noncommissioned officers and civilians alike."

On July 12, 1974, these two plaintiffs and several other Marines were displaying outside the main gate of the Air Station, a copy of a letter to Senator J. William Fulbright concerning United States support for the government of South Korea. They were immediately arrested for unauthorized distribution of written materials in violation of the regulations. Huff was court-martialed, sentenced to 60 days at hard labor, forfeiture of half-pay, and reduction in rank from E-3 to E-1, the lowest enlisted grade. Court-martial proceedings against Falatine were dismissed due to lack of evidence, but his arrest still appears as a part of his military record.

Subsequent to the arrests of Huff and Falatine, plaintiff Gabrielson requested permission to distribute the same Fulbright letter as well as a statement concerning the July 12 arrests of Huff, Falatine and other. Gabrielson was given permission to distribute the letter and accompanying statement on base, but not in the barracks, on the condition that no argument or debate of the issue would accompany the distribution. Permission to circulate the materials outside the main gate of the base was denied, however, because it would constitute "a form of political activity within the host country" in violation of the Status of Forces Agreement between the United

States and Japan.[8] Both Huff and Falatine also requested permission to circulate the petition and leaflet, and their requests were also granted for on-base distribution only.

Plaintiffs argue that despite the special constitutional restrictions imposed by virtue of the military situation, they are nonetheless entitled to have the regulations at issue here invalidated both on their face and as applied to plaintiffs in the instances detailed above.

Facial Validity of the Regulations

The Marine regulations applied against these plaintiffs are nearly identical to the Air Force regulations requiring prior approval for distribution of publications that were discussed in *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). Although the majority in *Carlson* "entertain[ed] significant doubts about the breadth and scope of the regulations," they did not reach the facial validity issue because the regulations were upheld as applied to servicemen who sought to distribute anti-war materials in a combat zone. The Supreme Court, however, recently held that Army regulations requiring prior approval for on-base distribution of political mate-

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[8] Article XVI of the Status of Forces Agreement between the United States and Japan reads as follows:

> It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

11 U.S.T. 1664, T.I.A.S. 4510.

rials "are not constitutionally invalid on their face." *Spock* v. *Greer*, *supra*, —— U.S. at——, 96 S.Ct. at 1217, 47 L.Ed.2d at 514, 44 U.S.L.W. at 4383. The standards for disapproval, "clear danger to the loyalty, discipline or morale of the troops" were also approved in the *Spock* ruling. Therefore, this Court must carefully examine the circumstances under which the restrictions were applied to plaintiffs and determine whether military necessity warranted the particular applications of the regulations in this case.

Validity of Regulations As Applied On-Base

The general rule in this Circuit is that the Supreme Court's constitutional standards shall govern "unless it is shown that conditions peculiar to military life require a different rule." *Kauffman* v. *Secretary of the Air Force*, 135 U.S.App.D.C. 1, 415 F.2d 991, 997 (1969), *cert. denied* 396 U.S. 1013, 90 S.Ct. 572, 24 L.Ed.2d 505 (1970). The task of this Court, therefore, is to "strike the proper balance between legitimate military needs and individual liberties." *Carlson*, *supra*, at 1331.[9] The *Carlson* majority held that the requirement of absolute discipline in a combat mission fully justified the prior approval requirement for circulating petitions. Likewise, in *Spock* it was held that prior approval for on-base distribution of political literature at Fort Dix, New Jersey was valid because of the "military interest in preserving a

[9] *See also, Glines* v. *Wade*, 401 F.Supp. 127, 130 (N.D. Cal. 1975) ("the latitude to be permitted in prescribing regulations varies with the magnitude of the governmental or military interest involved.")

relatively isolated sanctuary" during the basic training period,[10] and the maintenance of "a politically neutral military establishment under civilian control" which is "wholly free of entanglement with partisan political campaigns of any kind." [11]

In the present case, however, prior approval was required for on-base distribution among servicemen of petitions to Congress and other materials on political topics of interest to United States citizens. The base in question is located in Japan, and although it may be "combat-ready" [12] this is clearly not a combat zone case as in *Carlson*. Nor are the Marines at Iwakuni involved in basic training, as in *Spock* where separation from the political sphere was deemed to be of particular importance.[13] On the contrary, Amer-

[10] Spock, *supra*, at ——, 96 S.Ct. at 1223, 47 L.Ed.2d at 521, 44 U.S.L.W. at 4384 and 4386 (Powell, concurring).

[11] *Id.*, at ——, 96 S.Ct. at 1218, 47 L.Ed.2d at 515, 44 U.S. L.W. at 4383 (majority opinion).

[12] Affidavit of Lt. Gen. Leslie E. Brown, U. S. Marine Corps, filed as defendant's Exhibit A.

This "post-hoc" litigation affidavit attempts to rationalize the broad sweep of these regulations as applied to limited on-base activities by relying on the fact that Marines at Iwakuni must be prepared for deployment into combat at any time. A similar affidavit prepared to justify another Iwakuni regulation restricting individual liberties was held by our Circuit Court to be insufficient to foreclose discussion of the opposing factual claims raised by plaintiffs. *Hess* v. *Schlesinger*, 159 U.S.App.D.C. 51, 486 F.2d 1311 (1973).

[13] Defendants also rely on the case of *Committee for GI Rights* v. *Callaway*, 171 U.S.App.D.C. 73, 518 F.2d 466 (1975). The "poster regulation" prohibiting display of posters on barracks walls without prior command approval was upheld in

ican servicemen stationed in a foreign country have even less access to information and ideas concerning domestic politics than the soldiers in boot camp who are free to attend rallies and receive information from civilian, off-base sources. Therefore, the need to assure a free flow of information and ideas is crucial in the foreign base situation.

In addition, three of the four publications involved in this case were petitions or letters addressed to members of Congress. The right to petition the government for redress of grievances is specifically guaranteed by the First Amendment. Congress has provided special protection of the serviceman's rights in this area, by the enactment of 10 U.S.C. § 1034.[14]

The standards used in the incidents cited by plaintiffs, however, meet neither the constitutional[15] nor the Congressional standard. For instance, plaintiff Huff's request to distribute for signatures in his barracks a petition to Senator Allan Cranston regarding the use of the military and National Guard in labor disputes was denied because it contained "gross mis-

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the context of an overall drug abuse program instituted by the Army in response to a drug problem on European Army bases. The situation at Iwakuni is thus not comparable.

[14] *See* note 5, *supra*.

[15] In *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), the Supreme Court held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150-51, 89 S.Ct. at 938, 22 L.Ed. 2d at 167.

statements . . . impugning by innuendo the motives and conduct of the Commander-in-Chief. . . ." Plaintiff Falatine's request to distribute a petition addressed to Congressman Ronald Dellums in support of amnesty for Vietnam War resisters was denied for the same reason Huff's petition was denied. Finally, Falatine's request to distribute on-base a leaflet commenting on the Declaration of Independence and the First Amendment was denied because "the introductory paragraph is, by transparent implication, disrespectful and contemptuous of all your superiors, officers, noncommissioned officers and civilians alike." Plaintiff Huff's request to distribute the same leaflet off-base, however, was granted simultaneously with the denial of Falatine's request.

It is clear to this Court from these undisputed facts that plaintiffs' requests were denied on the basis of the *content* of the petitions and leaflets, rather than legitimate military security requirements. Indeed, defendants conceded in their memorandum of points and authorities (at p. 3) that in all three of these instances, the denials were based on criteria other than "clear danger to loyalty, discipline and morale" or material interference with the accomplishment of the mission, as set forth in the regulations.

In this Court's opinion, not only were the denials arbitrary misapplications of the regulations, but the very system of prior restraints for serviceman-to-serviceman distribution of materials on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment freedoms.

Two other district courts have recognized the right of military personnel to distribute written materials among themselves, without first securing prior clearance from a commanding officer. In *Glines* v. *Wade*, 401 F.Supp. 127 (N.D.Cal. 1975), the Court held that comparable Air Force regulations were unconstitutional as applied to petitioning activities which occurred during a routine training flight to Anderson Air Force Base in Guam. The *Glines* case held that the military interest in restricting distribution of petitions during peacetime in a non-combat area was "relatively insubstantial." *Id.* at 130. There is a chilling effect involved in requiring prior approval for distribution in situations where the threat to security is minimal, which is "particularly apparent in a military setting, where petitions addressed to members of Congress are very likely to involve complaints about military policies or about the administration of military affairs by superior officers." *Id.* at 131.

Similarly, in *Allen v. Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975), enlisted members of the United States Navy stationed on two aircraft carriers sought to distribute petitions to Congress concerning objections to assignments in the Far East. The District Court in California held that the Naval Regulations requiring prior approval of on-ship distribution of petitions to Congress constituted an overbroad prior restraint on protected activities and as such, were unconstitutional. The requirement of prior approval might well deter some persons from circulating legiti-

mate petitions out of "real or imagined fear of reprisal." *Id.* at 1087. The *Allen* opinion went on to hold, however, that while pre-screening of petitions to be distributed on board ship is unconstitutional outside a combat area, the Navy may issue regulations concerning the time, place and manner of distribution.

Likewise, in this case, the military interest in restricting on-base distributions among service personnel in a non-combat area is minimal, and is outweighed by the individual's interest in free speech. Establishing lines of communication among servicemen is especially important on bases in foreign countries which may have more restricted access to civilian sources of ideas than their counterparts in the States.

Of course, as it was pointed out in the *Carlson* case, military officials may regulate the "time, place and manner" of First Amendment activity. 511 F.2d at 1331. The regulations in this case, however, require prior command approval for all distributions and thus unduly restrict First Amendment activity without the requisite showing of military need. Therefore, the regulations are unconstitutional as applied to on-base distribution of written materials. Regulations which allowed such activity without prior approval only during off-hours and in recreational or public areas of the base would, of course, be reasonable.

Validity of Regulations As Applied Off-Base

Off-base petitioning presents a somewhat different problem due to unique conditions prevailing for American armed service personnel stationed in foreign countries. As mentioned above, the political activities of Marines at Iwakuni are restricted by the Status of Forces Agreement[16] which prohibits members of the United States Armed Forces from engaging in any political activity in Japan.

Two instances of off-base petitioning are involved in this case, which the government alleges were prohibited by virtue of the Agreement. On July 12, 1974, Huff and Falatine were arrested by military police, while circulating off-base a letter to Senator Fulbright protesting United States support of South Korea. Huff was court-martialed and convicted but the charges against Falatine were dropped. In late July and early August, 1974, all three plaintiffs requested permission to distribute the same letter and a statement regarding the previous arrests. Permission was granted as to on-base distribution, but denied for off-base.

Since the political activities of the Marines are restricted by an international agreement, it is not unreasonable to require prior approval for off-base petitioning. In this area, the military has demonstrated a substantial interest in pre-screening written materials, just as they were able to demonstrate a special interest in regulating petitioning in combat zones,

[16] *See* note 8, *supra*.

Carlson, *supra*, and in boot camp, *Spock*, *supra*. Judge John Pratt of this Court recently ruled that "the exigencies and considerations attendant to service in a foreign country" justified a prohibition against demonstrations by members of the armed forces while serving abroad. *Culver* v. *Secretary of the Air Force*, 389 F.Supp. 331, 334 (D.D.C. 1975) (off-base demonstration).

The letter to Senator Fulbright was concerned with an issue which was very controversial in internal Japanese politics at that time. Two Japanese students were facing courts-martial in South Korea, and demonstrations were taking place in Japan to protest the policies of the South Korean president.[17] Thus, the Commanding General who denied permission for off-base distribution had a valid basis for doing so because, under the circumstances, the letter and accompanying statement could have been interpreted to be a form of interference in internal Japanese politics. The effect of the off-base prohibition was also alleviated by the fact that plaintiffs were allowed to distribute their petitions within the boundaries of the American military base, so that an alternate forum was provided in which plaintiffs could reach their fellow Marines.

The prior approval restriction on off-base distributions is constitutional because of the military's need

[17] These manifestations of Japanese involvement and concern regarding the policies of the South Korean government were mentioned in the Fulbright letter and accompanying statement. *See* Defendants' Exhibit F, nos. 61 and 62. *See also* newspaper articles contained in Defendants' Exhibit J.

to assure that international agreements are obeyed. Thus, it would be inappropriate for this Court to overturn plaintiff Huff's conviction or to expunge the arrest records of Huff and Falatine, who were arrested for *off-base* distribution without prior approval. Had they been arrested within the gates of the Marine base, or had the military officials failed to provide an alternate on-base forum for expression in this instance, then the case for expungement would have been stronger. Under the present state of the law, however, courts cannot order expungement for an admitted violation of a constitutionally valid regulation.[18]

Counsel for the plaintiffs will submit an appropriate order in conformance with the foregoing opinion by May 26, 1976.

[18] In *Sullivan* v. *Murphy*, 156 U.S.App.D.C. 28, 478 F.2d 938, 968, *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973), our Circuit Court held that expungement of arrest records was an "appropriate remedy in the wake of police action in violation of constitutional rights." It follows that this remedy is inappropriate where plaintiffs have failed to show a constitutional violation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil 75-0043

[Filed March 15, 1978]

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN, TAMM and ROBINSON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, and the judgment is also vacated, in part, and this case is remanded to the District

Court with directions to revise its judgment in the manner indicated, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 15, 1978

Opinion for the Court filed by Circuit Judge McGowan

Opinion filed by Circuit Judge Tamm, concurring in part and dissenting in part.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil Action #75-0043

[Filed May 15, 1978]

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

Before: McGOWAN, TAMM and ROBINSON,
Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed herein by appellants, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil Action #75-0043

[Filed May 15, 1978]

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

On consideration of the suggestion for rehearing *en banc* filed by appellants herein, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon and Robb would grant appellants' suggestion for rehearing *en banc*.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0043

[Filed May 27, 1976]

PRIVATE FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This cause came on to be heard on the motion of plaintiffs for summary judgment and the cross-motion of defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings and the entire record, and counsel for the parties having been heard in open Court, and it appearing that there is no genuine issue as to any fact material to the disposition of this cause and that as set forth in this Court's Memorandum Opinion of May 21, 1976, plaintiffs are entitled as a matter of law to the entry of judgment in their favor against defendants in part, it is by the Court this 27th day of May, 1976,

ORDERED that the plaintiffs' motion for summary judgment be and is hereby granted in part in the respects set forth below; and it is further

ORDERED, ADJUDGED, and DECREED that:

1. The defendants denied plaintiffs Huff, Falatine, and Gabrielson their constitutional and statutory rights by prohibiting and/or restricting their distribution of petitions and other printed materials on-base at the Marine Corps Air Station, Iwakuni, Japan, through the arbitrary application of 1st Marine Aircraft Wing Order 5370.1A and Marine Corps Air Station Order 5370.3A;

2. 1st Marine Aircraft Wing Order 5370.1B, Marine Air Station (Iwakuni, Japan) Order 5370.3B, Fleet Marine Force, Pacific Order 5370.3, and Commander-in-Chief, Pacific Fleet Instruction 5440.3C are unconstitutional as applied to serviceman-to-serviceman distribution of printed materials on-base during off-hours and away from restricted or work areas;

3. MAWO 5370.1B, MCASO 5370.3B, FMFO 5370.3, and CINCPACFLTINST 5440.3C violate the rights of members of the Armed Forces under 10 U.S. Code § 1034 to circulate petitions to Congress on-base during off-hours and away from restricted or work areas;

4. The aforesaid regulations are constitutional as applied to off-base distributions in a foreign country in order to assure compliance with international agreements, such as the Status of Forces Agreement applicable in Japan, Article XVI, 11 U.S.T. 1664, T.I.A.S. 4510.

5. Defendants, their agents, servants, employees and attorneys, and all persons in active concert and

participation with them, be and hereby are restrained from continuing to deny plaintiffs their rights under the First Amendment to the United States Constitution and under 10 U.S. Code § 1034 by requiring prior approval for serviceman-to-serviceman distribution of printed materials during off-hours and away from restricted or work areas on-base at the Marine Corps Air Station, Iwakuni, Japan;

And it is further

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment in all other respects be and hereby is denied; and it is further

ORDERED that this Order is final and judgment shall be entered accordingly.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

Copies to Counsel.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 75-0043

FRANK L. HUFF, ET AL., PLAINTIFFS,

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS.

AFFIDAVIT OF
LIEUTENANT GENERAL LESLIE E. BROWN
UNITED STATES MARINE CORPS

I, Lieutenant General Leslie E. Brown, United States Marine Corps, being duly sworn, state that the matters set forth herein are true and correct to the best of my knowledge and belief:

Since July 1, 1975, I have served as Chief of Staff, Headquarters, United States Marine Corps. In this capacity I serve as the executive officer to the Commandant of the Marine Corps and am responsible for directing, coordinating, and supervising staff activities at Headquarters, United States Marine Corps, and performing such other duties as may be directed by the Commandant. These duties include the formulation and continual implementation of policies for the Marine Corps, including those policies being challenged in the instant lawsuit.

I have served in the United States Marine Corps since 1940 and have held a commission therein since

November of 1942. I am also personally familiar with the mission and operation of the First Marine Aircraft Wing, and with the Marine Corps Air Station, Iwakuni, Japan, having served as the Commanding General, First Marine Aircraft Wing, Marine Corps Air Station, Iwakuni, Japan, from April 25, 1972, until April 26, 1973.

The Marine Corps Air Station (M.C.A.S.), Iwakuni, Japan, consists of 1,451 acres immediately adjacent to the City of Iwakuni, Japan. Marine Corps units currently stationed at M.C.A.S., Iwakuni, consist of personnel, officer and enlisted, assigned to supporting the Air Station and the tenant tactical First Marine Aircraft Wing.

The mission of M.C.A.S., Iwakuni, is to maintain and operate facilities and provide services and material to support operations of the First Marine Aircraft Wing or units thereof, and other activities and units as designated by the Commandant of the Marine Corps in coordination with the Chief of Naval Operations. In order to accomplish its functional tasks of maintenance, operational training support, search and rescue, personnel services, shore patrol/armed forces policing, weather service, terminal radar and air traffic-control, and other support functions, M.C.A.S., Iwakuni, currently has assigned a total of 41 officers and 345 enlisted Marine personnel. Additionally, 39 officers and 624 enlisted Marine personnel are assigned from Marine Aircraft Wing resources under the Fleet Assistance Program (FAP). Current U.S. Navy personnel assignments consist of 12 officers

and 94 enlisted for medical, dental, and religious support purposes. The Commanding Officer of M.C.A.S., Iwakuni, is responsive to the Commanding General, Fleet Marine Force, Pacific, in his dual capacity as the Commanding General of Marine Corps Bases, Pacific.

The tenant tactical command currently headquartered at M.C.A.S., Iwakuni, is the First Marine Aircraft Wing and certain elements thereof.

The mission of the First Marine Aircraft Wing is to conduct air operations in support of the Fleet Marine Forces, Pacific, to include anti-air warfare, offensive air support, assault support, aerial reconnaissance, control of aircraft and missiles, and as a collateral function, to participate as an integral component of Naval Aviation in the execution of such other Navy functions as the Fleet Commanders direct. Functional tasks, in addition to the tasks associated with the above mentioned mission, include the coordination of overall training requirements, deployment of trained combat ready units/detachments aboard Navy ships, providing facilities for the control/handling of passengers, cargo, and casualties as may be required, conducting aerial refueling services, maintaining a ground defense capability, and to collect, process, evaluate, and disseminate intelligence.

In order to accomplish the assigned mission, the First Marine Aircraft Wing has approximately 7774 officer and enlisted Marine personnel assigned and 210 supporting U.S. Navy personnel assigned. Of this total, approximately 4974 Marines and 86 Naval

personnel are stationed at M.C.A.S., Iwakuni. The First Marine Aircraft Wing tactical units based at M.C.A.S., Iwakuni, may be categorized as Headquarters Support units, Marine Air Central units, attack and fighter-attack aircraft, and reconnaissance squadrons with an integral support unit capability, and support group units.

The First Marine Aircraft Wing is a task organization of various groups. These groups are composed of squadrons which provide the means, namely aircraft, support equipment, and administrative personnel, required to perform assigned tasks. The squadrons are the organizational building blocks employed in organizing air task-type units. The First Marine Aircraft Wing is the highest level tactical Marine Aviation command in the Far East.

The Fleet Marine Force, Pacific, is a balanced force of combined air and ground arms primarily trained, organized, and equipped for amphibious employment in the Pacific. The First Marine Aircraft Wing is the aviation component of Fleet Marine Force, Pacific, a type command under the Commander in Chief, U.S. Pacific Fleet. As our nation's Force-in-Readiness, the Marine Corps must therefore be prepared and ready when called upon to execute a rapid response as an effective air-ground team. Based upon this concept, the status of individual unit combat readiness is of vital importance to all Marine forces. The First Marine Aircraft Wing, not unlike the other Aircraft Wings, maintains the required combat readiness by continuous planned and coordinated training.

The First Marine Aircraft Wing, its personnel and equipment, is constantly maintained in a high degree of readiness for possible combat deployment on extremely short notice. For example, in early 1972, units of the First Marine Aircraft Wing stationed at Iwakuni, deployed to combat bases in Vietnam and Thailand within 24 hours of receiving notice. Later, during the spring of 1975, elements of the First Marine Aircraft Wing were rapidly deployed to assist in the evacuation of Phnom Penh and Saigon. At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.

Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. A well-trained and disciplined Marine, when considering the mission of the supporting units, must be prepared for instantaneous deployment for such contingency operations, ranging from protection/evacuation to combat operations. The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. The term Force-in-Readiness includes not only the material means to engage a potential adversary but also the mental capacity and discipline to adhere to orders, plus the will to engage and destroy the enemy. These traits must be inherent in

each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated. Therefore, the regulations under challenge in this lawsuit, which afford a Commander the ability and authorization to screen such printed material prior to its distribution, are in keeping with the requirement for the safety and well-being of his troops.

/s/ Leslie E. Brown
LESLIE E. BROWN
Lieutenant General
United States Marine Corps

Subscribed and sworn to before
me this 19th day of September, 1975.

/s/ Virginia M. Smith
Notary Public
My commission expires: 31 July 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 273483 119

No. 78-599

In the Supreme Court of the United States

OCTOBER TERM, 1978

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-599

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

Our petition noted (Pet. 11 n.9) that two district court decisions, then pending on appeal, had held the regulations challenged in this case to be unconstitutional. These cases now have been decided on appeal. In *Allen* v. *Monger*, No. 76-1125 (9th Cir. Oct. 4, 1978) (App., *infra*, 1a-12a), the court of appeals relied on the decision and reasoning of the District of Columbia Circuit in this case for its conclusion that 10 U.S.C. 1034 bars application of the challenged regulations to require the approval of base command-

ers prior to circulating petitions to Members of Congress on military bases. In *Glines* v. *Wade*, No. 76-1412 (9th Cir. Oct. 5, 1978) (App., *infra*, 13a-27a), the court held that, insofar as the challenged regulations apply to petitions addressed to persons other than Members of Congress,[1] the prior approval requirement is substantially overbroad and violates the First Amendment.[2]

These decisions reinforce our concern that the courts of appeals improperly have left the military departments powerless to stop the on-base circulation of petitions, and now other materials as well, even when such materials pose a clear danger to military discipline, loyalty or morale, and even when they materially undermine the effective accomplishment of the assigned military mission.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

[1] One of the petitions involved in that case was addressed to the Secretary of Defense (App., *infra*, 21a).

[2] The Solicitor General is considering whether to file a petition for writs of certiorari in *Allen* and *Glines*.

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-1125

WAYNE M. ALLEN ET AL., APPELLEES

v.

A. J. MONGER ET AL., APPELLANTS

GEORGE T. MOSES ET AL., APPELLEES

v.

S. R. FOLEY, JR., ET AL., APPELLANTS

Oct. 4, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a decree enjoining enforcement by the Navy of regulations restricting sailors in the circulation of petitions addressed to members of Congress. We affirm.

* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

In the spring of 1973 some crew members on two aircraft carriers stationed in Alameda, California, prepared petitions to various members of Congress, objecting to planned movements of their ships. Certain enlisted men of the U.S.C. Hancock objected to another West Pacific cruise. Some crew members of the U.S.S. Midway opposed its intended homeporting in Japan.

The Hancock protesters had their petition [1] printed off the base, and requested Captain (now Admiral) Monger, the Hancock's commanding officer, to authorize its distribution. Captain Monger denied permission, citing U.S.S. Hancock Instruction 1620.4A, which was based on Naval Instruction 1620.1. These instructions require prior approval for the distribution of printed materials. The commander may deny permission if the materials present "a clear danger to the loyalty, discipline, or morale of military personnel" or if the distribution "would materially interfere with the accomplishment of a military mission." Captain Monger said that circulating the petition might upset the morale and discipline of a green crew preparing for a new cruise.

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[1] The Hancock petition said:

"Dear Congressman Stark,

We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise."

One protester distributed the petition despite Captain Monger's action, and was subsequently punished at a Captain's Mast. Other sailors were deterred from circulating the petition.

Certain crew members on the Midway also sought to circulate a petition to members of Congress opposing a proposed change in home ports.[2] Like the Hancock petition, the Midway petition did not suggest that anyone should disobey an order or otherwise refuse to do his duty. This petition was also printed off base at no expense to the government. The peti-

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[2] The Midway petition said:

"We, the crew and families of the U.S.C. Midway, do hereby exercise our rights as citizens of the United States of America to petition Congress on the following issue. We object to the homeporting in Yokosuka, Japan of the U.S.S. Midway for the following reasons:

"(1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the Midway in Yokosuka is another attempt by the U.S. to permanently establish its military preesnce in Asia.

"(2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.

"(3) We disapprove of the government's lack of preparations in providing housing and other living accommodations to support our full complement of crew and families.

"(4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely, (a) the right to free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress."

tioners requested Captain (now Admiral) Foley, the Midway's commander, to permit circulation of the petition, and he refused. He later refused to permit circulation of a slightly modified petition. He based his refusal upon Midway Instruction 1620.6, which was also derived from Naval Instruction 1620.1. Because of Captain Foley's decision, the Midway petitioners did not circulate the petition on board ship.

Both the Hancock and the Midway protesters filed actions in district court, alleging that the restrictions on petitioning were unconstitutional abridgements of their First Amendment rights and that they violated 10 U.S.C. § 1034.

The district court consolidated the cases. The court then held the cases in abeyance pending naval administrative-review process. After at least one sailor from each ship lost his administrative appeal, the district court certified the actions as class actions.

The district court held that the regulations would have a chilling effect on the exercise of First Amendment rights, and held them to be invalid as applied and overbroad. The court also held that the regulations violated § 1034. The court enjoined enforcement, but provided the Navy leave to promulgate new regulations that would limit the time, place, and manner of petitioning to avoid interference with the ships' functioning. *Allen* v. *Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975). The government appeal challenges the decrees in several respects.

I. MOOTNESS

A preliminary issue is whether the case is moot. The district court found jurisdiction under 28 U.S.C. § 1331. We have applied § 1331, as it stands after the 1976 amendment deleting the $10,000 jurisdictional amount, to a case filed before the amendment passed. *Stickelman* v. *United States*, 563 F.2d 413, 415 n.2 (9th Cir. 1977). Subject-matter jurisdiction under § 1331 has been satisfied.

The Hancock is no longer in service, and most, if not all, of the petitioners have since been discharged. The government therefore suggests that these cases are moot. Similar regulations, however, remain in effect throughout the Navy. No one now seeks to circulate the Hancock or Midway petitions. It is unlikely that any similar petition could keep the issue alive long enough for a case to reach this court on appeal. Military enlistments are for a few years at a time. Any particular plaintiff probably would complete an enlistment before he or she could complete the judicial process. Yet the regulations raise serious questions that deserve judicial review. These regulations and the resulting issues are clearly "capable of repetition, yet evading review," and therefore are not moot. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911), *quoted in Roe* v. *Wade*, 410 U.S. 113, 125, 93 St.Ct. 705, 35 L.Ed.2d 147 (1973).

II. PROTECTION FOR PETITIONING

On appeal, the petitioners again urge their constitutional arguments. However, because the district court's decision may be upheld on purely statutory grounds, we have no occasion to reach the constitutional issue.

Title 10 U.S.C. § 1034 provides:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

We must decide, first, whether § 1034 applies to concerted activities such as petitions, and, second, whether the regulations which prohibited the circulation of the petition are "necessary to the security of the United States."

The District of Columbia Circuit recently considered both questions and held that § 1034 covers petitioning and that these regulations are not necessary to the national security. *Huff* v. *Secretary of the Navy*, —— U.S.App.D.C. ——, 575 F.2d 907 (1978). We agree.

Section 1034 prohibits restrictions on communications with Congress; it does not by its terms distinguish among different kinds of communications. Congress would no doubt consider a signed petition addressed to members of Congress to be communication with it.

Some military personnel might find it easier to communicate by signing a petition than by writing a letter. Others might believe that one petition signed by many voters would have more impact than scattered individual letters. While the statute speaks of "any member", we do not think its use of the singular is controlling. A literal reading would deny protection even to a letter if two people drafted and signed it. We prefer to read the statute in light of the traditional ways Americans communicate with their legislators; petitioning is traditional.

Congressman John W. Byrnes of Wisconsin first introduced the issue in the debates on the Universal Military Service and Training Act of 1951, Pub.L. 82-51, 65 Stat. 75 (1951). He did so because of the difficulty one of his constituents in the Navy asserted in writing him about an individual problem. The colloquy between Congressman Byrnes and Congressman Vinson, chairman of the House Armed Services Committee, primarily inquired into the current regulations to determine their effect upon communications concerning individual grievances. As originally adopted, the amendment prohibited drafting anyone into a branch of the armed forces that limited the rights of its members to communicate directly with members of Congress. 97 Cong.Rec. 3775-76 (April 12, 1951).

Since Congressman Byrnes' original amendment was to a proposed substitute to the pending bill, it lapsed when the substitute was defeated. Congressman Vinson wrote a different version, which Con-

gressman Byrnes approved and eventually introduced the next day. This version is the one Congress adopted, and, with minor amendments made in 1956, it is the source of § 1034.[3] Under this proposal, no member of the armed forces could be restricted from communicating "directly or indirectly" with any member or members of Congress "concerning any subject" unless the communication violated a law or a regulation necessary to the security and safety of the United States. 97 Cong.Rec. 3877, 3883 (April 13, 1951). While Congressman Vinson again described the statute as one letting any man write his congressman, the language indicated a broader purpose. It did not simply cover all branches instead of just those taking draftees; it also changed the nature of the right given.

Congressman Byrnes' original concern was with military persons facing individual hardships who wanted their congressman's help. His emphasis was on Navy regulations which seemed to limit direct communication on personal problems. The Congressman did not then object to Army regulations which severely restricted communications on general legislative matters. Letters of the Secretary of the Navy and of the Secretary of the Army to Congressman Byrnes, in 97 Cong.Rec. 3776 (April 12, 1951).

The Vinson modification, however, prohibited restrictions on communications "on any subject". This

[3] Act of June 19, 1951, Pub.L.No. 82-51, § 1(d) (last paragraph), 65 Stat. 78.

modification was made a day or two after President Truman's dismissal of General MacArthur, in part for his communicating with Congress outside regular channels, and about a week before the general addressed a joint session of Congress.[4] In this light, it seems clear that Congress was willing to break with traditional notions of military discipline in order to assure that Congress would receive communications reflecting a variety of military sentiment on important issues. In this change, Congress went well beyond Congressman Byrnes' original focus on individual grievances.

The Vinson proposal also allowed communicating "directly or indirectly" with members of Congress. This phrase may have been inspired by General MacArthur's use of press conferences, but it may also have been intended to cover enlisted persons who simply chose to sign petitions. Petitioners communicate with Congress, but they do so indirectly, by showing their approval of language someone else has written rather than by writing their own language. Congress deleted the "directly or indirectly" phrase, along with "concerning any subject", in 1956 when it adopted current § 1034. The codifiers note, correctly,

[4] Congressmen debated the bill with MacArthur's dismissal in mind. The issue immediately before Congressman Byrnes introduced the final version was a proposed amendment to give the commander in the field all power to decide what supply facilities, troop concentrations, and other targets to bomb. MacArthur's objections to the restraints President Truman placed on him in these regards were, of course, a major issue in his removal. 97 Cong.Rec. 3883 (April 13, 1951).

we believe, that the language was surplusage. The 1956 changes, therefore, did not change the statute's meaning. 10 U.S.C. § 1034, explanatory note.

The 1956 amendment also changed "member or members of Congress" to "member of Congress"; again, the change was to eliminate surplusage. This treatment of the plural encourages us to give less weight to the singular "any member of an armed force" in § 1034. Congress clearly intended to protect communication with several members of Congress at a time, even though it used the singular; while the record is not so clear, it is unlikely that Congress intended to restrict protected communication by more than one member of the armed forces at a time.

We therefore hold that § 1034 protects petitioning. The importance petitioning Congress has played in our history, combined with a legislative history that shows Congress concerned to keep communications open despite threats to discipline and a history of verbal changes in the statute that encourages a broad interpretation of its protections, all lead to this conclusion. The right to petition, of course, includes a reasonable opportunity to solicit signatures for the petition.

III. PRIOR RESTRAINTS

Naval Instruction 1620.1 and the related instructions on the Hancock and the Midway establish a system of prior restraint on petitions to Congress. They do not distinguish between ships at port in home waters and ships actively engaged in combat in a

combat zone. Under § 1034 these regulations are valid only if they are "necessary to the security of the United States". *Huff* v. *Secretary of the Navy*, —— U.S.App.D.C. at ——, 575 F.2d at 914. As did the District of Columbia Circuit in *Huff*, we hold that the Navy has failed to show that the national security required a system of prior restraints in these cases.

Both commanding officers apparently thought that circulation of the petitions might affect the discipline and morale of their commands. The actual circulation on the Hancock had produced some resentment among nonpetitioning sailors.[5] The district court took the view that time, place, and manner regulations could insure that petitioning would not disrupt the ships' orderly operations. The Uniform Code of Military Justice under certain circumstances enables the Navy to punish a crew member whose petition is truly disruptive. These petitions, while they were disagreeable to the Navy, did not threaten the national security.

The standard of protection under § 1034 is high. Congress in adopting it consciously chose to give communication with Congress preference over the prefer-

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[5] No commanding officer relishes the prospect of having a well-trained and dedicated military unit branded as "crybabies" by the patrons of service clubs, messes, and waterfront taverns. The damage to morale and the nuisance of resulting disorders cannot be ignored. The prospect of these dysfunctional results from the exercise of the rights protected by the statute apparently did not weigh as heavily upon the members of Congress as did the desire to keep communications open.

ences of military commanders. Prior restraints are suspect in the constitutional context. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). They stand no better in a statutory setting. Well publicized petitions may inconvenience the military. Some petitions may even produce division and morale problems, but we canot say that there is no less restrictive method than total prior restraint to protect the national security. Since the regulations are overbroad and exceed the needs of the national security, we affirm the district court.

Greer v. *Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), which the government emphasizes, does not apply to this case. *Greer* rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit.

Affirmed.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-1412

ALBERT EDWARD GLINES, APPELLEE

v.

JAMES L. WADE, Commander 349th Material Airlift Wing, MAJOR GENERAL GONGE, Commander 22nd Air Force, JOHN L. MCLUCAS, Secretary of the Air Force, JAMES SCHLESINGER, Secretary of Defense, APPELLANTS

Oct. 5, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges, and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a judgment ordering reinstatement in the Air Force, back pay, and declaratory relief which struck down as unconstitutional certain Air Force regulations.

We affirm the nonmonetary parts of the judgment but vacate that portion awarding back pay as beyond the jurisdiction of the district court to grant.

Albert Glines was a Captain in the Air Force Reserves. While on active duty, he took training as a

* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

navigator instructor. Air Force standards describing maximum hair length offended him. To show his opposition, he drafted essentially identical petitions to several members of Congress and to the Secretary of Defense.[1] He intended to seek signatures to the petitions at his home station, Travis Air Force Base. Captain Glines learned, however, that Air Force Regulation 30-1(9) prohibits "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * unless first authorized by the commander" and that AFR 35-15(3)(a)(1) prohibits the distribution of "any printed or written material * * * within any Air Force installation without permission of the Commander or his

[1] The petitions were identical except for the names of the person to whom they were directed and of the others to whom petitions were also being sent. That to the Secretary of Defense read:

"Dear Secretary of Defense:

"We the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

"We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

"We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem."

designee."[2] Because of these regulations, Captain

[2] AFR 30-1(9) reads:

"9. *Right of Petition.* Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander."

AFR 35-15(3)(a) reads:

"3. *Specific Guidelines and Prohibited Activities:*

a. *Possession and Distribution of Written or Printed Materials:*

(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander of his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be im-

Glines first circulated the petitions off base. Later he decided to ignore the regulations and to circulate the petitions on base. He also shaved his head.

The record does not show whether Captain Glines actually circulated the petitions on the Travis reservation. In April 1974, during a stopover at Guam, he gave copies of the petitions to a Sergeant Wolf. Sergeant Wolf gained eight signatures on Guam before base authorities learned of his activities, stopped them, and helped the signatories learn "the error of their ways". The Air Force immediately removed Captain Glines from active duty and soon afterwards reassigned him to the standby reserves. As a "standby" he was unable to complete his navigator instructor instructor training and lost other benefits.

Captain Glines brought this action alleging that the regulation of petitions violated 10 U.S.C. § 1034 and the First Amendment. He sought reinstatement and back pay. The district court declared the regulations void for statutory and constitutional infirmities, ordered Captain Glines reinstated in the active re-

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pounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues."

serve, and awarded him more than $22,000 in back pay. *Glines* v. *Wade*, 401 F.Supp. 127 (N.D.Cal. 1975). The government appeal challenges the judgment on a number of grounds.

I. *Exhaustion of Administrative Remedies*

The government first argues that the district court should have required Captain Glines to seek relief from the Air Force Board for the Correction of Military Records (AFBCMR) before bringing this action. This point is not well taken.

Captain Glines' claim depends on constitutional and statutory interpretations which are beyond the scope of the jurisdiction of the AFBCMR. While the government treats the case as simply a claim for reinstatement and back pay, Captain Glines also sought and received a declaratory judgment invalidating the challenged regulations. Without this judgment he would remain subject to the regulations after his reinstatement. "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

The AFBCMR was never intended by Congress to resolve the essentially legal issues involved in this case. Like other BCMRs, it is a clemency-oriented body, with authority to "correct an error or remove an injustice," 10 U.S.C. § 1552(a), not to declare the law. The Board simply substitutes for private congressional bills its remedy for individual grievances.

Congress stopped accepting such private bills when it authorized the BCMRs. 2 U.S.C. § 190g. BCMRs are not necessarily legally trained. They get their legal advice from the Judge Advocate General's office. *See, e.g., Flute* v. *United States*, 535 F.2d 624, 627-28, 210 Ct.Cl. 34 (1976). The AFBCMR has no authority to declare the challenged regulations invalid. Even if it gave Captain Glines all the redress within its power, it would not be able to protect him from further attempts by the Air Force to enforce its regulations. Only a court can do so.[3]

We recently held that a district court may require exhaustion to a BCMR, in its discretion, after balancing the relevant factors. *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 252-54 (9th Cir. 1978). The district court, of course, did not have the opportunity to do the balancing we suggested in *Montgomery*. However, the district court did not in this case require exhaustion, and, for the reasons indicated, we agree with the district court.

II. *Statutory Claim*

10 U.S.C. § 1034 prohibits restrictions on communications between members of the military and members of Congress unless the communication is unlawful or the restrictions are necessary to the national security.[4] In *Allen* v. *Monger*, —— F.2d —— (slip opin. p. 3239) (9th Cir. 1978), we struck down under § 1034 Naval regulations requiring prior approval for the circulation of petitions on a ship at port in the United States. We held that the Navy's system of prior restraints was not necessary to the national security in the factual situation described in the *Allen* case.

The District of Columbia Circuit has upheld similar restrictions when applied to an actual combat zone. *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). On the other hand, the same court has struck down regulations inconsistent with § 1034 when they were applied to a combat-ready base in Japan. *Huff* v. *Secretary of the Navy*, 188 U.S.App. D.C. ——, 575 F.2d 907 (1978). The base commander filed an affidavit emphasizing the combat-ready nature of the base, but the majority found his argument unpersuasive.

The record now before us does not indicate the precise nature of the base on Guam where Captain Glines handed Sergeant Wolf the petitions. The government has not shown that Guam was more sensitive or that petitioning on that base was inherently

[3] *Schlesinger* v. *Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1974), which the government cites, involved a district court's authority to enjoin a court-martial allegedly acting in excess of its jurisdiction. A courtmartial is, of course, a legally oriented body, as are the military appeals courts. They are competent to decide their own jurisdiction, and they do not take their legal advice directly from the Judge Advocate General's office.

[4] 10 U.S.C. § 1034 reads:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulatio nnecessary to the security of the United States."

more disruptive than was true of the base involved in *Huff*. While prior restraints on petitioning may promote some military objectives, the government has not shown that such restraints are actually necessary to the national security outside of a combat zone.

Despite proper deference to the military's ability to judge the impact of unauthorized petitioning on discipline, we do not believe the government has shown that the bad effects of petitioning would endanger the national security in these circumstances.[5] This is a determination we must make independently, for Congress in adopting § 1034 has consciously restricted military command discretion on this point.

Only if we determine that the petitions are a threat to national security can we uphold the military restriction. "[W]e do not think that the national security can be said to require that the objective of military discipline be pursued to the exclusion of all other interests. If this were the case, then § 1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline." *Huff* v. *Secretary of the Navy*, 188 U.S.App.D.C. at ——, 575 F.2d at 914. Congress adopted § 1034 because it preferred free communication with military personnel to absolute discipline in the military; AFR

[5] Glines was disciplined for violating the regulations requiring prior approval. The Air Force does not contend that he did anything else that would have subjected him to discipline.

30-1(9) and 35-15(3)(a) improperly ignore the Congressional policy.[6]

III. *Constitutional Claims*

Read literally, § 1034 protects only the four petitions addressed to members of Congress. One petition, which was essentially identical to the others, was addressed to the Secretary of Defense. This petition requires us to decide whether the First Amendment also protects Glines' activities.

It is clear that these regulations would be unconstitutional on their face if they applied to the public at large. Prior restraints on speech face a heavy burden of justification, which they are seldom able to meet. *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). First Amendment rights do not expire upon enlistment in a military arm, although the needs of the service may modify the extent of the application of these rights. "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." *Parker* v. *Levy*, 417 U.S. 733, 758-59, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), quoting, at 759, 94 S.Ct. at 2563, *United States* v. *Gray*, 20 U.S.C.M.A. 63 (1970). The issue

[6] This discussion assumes that military discipline and free speech are necessarily incompatible. There is a strong argument to the contrary. Donald N. Zillman, *Free Speech and Military Command*, 1977 Utah L.Rev. 423, 433-34.

in *Parker* v. *Levy* was whether various Articles of the Uniform Code of Military Justice were too vague to support a conviction for statements urging enlisted men to disobey orders. The Supreme Court held that they were not. There was no prior restraint involved.

The First Amendment protects this country's basic commitment to open and vigorous debate. We have assumed as a nation that free discussion will be likely to lead to the right decisions, that, as Justice Brandeis said, when falsehoods and fallacies abound, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity.

A requirement for precirculation clearance is obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment.

> ". . . [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights * * *.
>
> "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least, for the time." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

The military need for obedience and discipline may justify certain restrictions on speech that would be impermissible in civilian life. As *Parker* v. *Levy*, *supra*, shows, speech that poses a genuine threat of

undermining obedience to orders may subject the speaker to appropriate punishment.[7] If Glines' activities had violated regulations that focused on these considerations, the Air Force's response might be acceptable. Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures would adequately protect the government's interest.[8]

The Supreme Court insists on less restrictive alternatives to prior restraint when they are available, and it critically examines whether the restraint will have its intended effect. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 563-70, 96 S.Ct. 2791. Less restrictive alternatives are available.

We have emphasized that these regulations are prior restraints on speech. The government suggests that they are, instead, merely time, place, and manner restrictions. This is how the District of Columbia Circuit treated the same regulations as applied in a

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[7] We do not believe that vocal disagreement with public policy by itself necessarily leads to disobedience to orders. "I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means." *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 335, 511 F.2d 1327, 1337 (1975) (Bazelon, J., dissenting).

[8] See the limitations the district court adopted, and we approved on appeal, in *Allen* v. *Monger*, 404 F.Supp. 1081, 1090 (N.D.Cal. 1975), *aff'd supra*.

combat zone. *Carlson* v. *Schlesinger*, *supra*. A combat zone, of course, is only a small part of the total military deployment. Restrictions there do not necessarily support restrictions throughout all other military reservations. Indeed, to treat these regulations as time, place, and manner restrictions necessarily implies that there must be other places within the military jurisdiction where petitioning by military personnel is permitted. Assuming that we would agree with the majority in *Carlson*, therefore, we do not think *Carlson* compels us to give combat-zone status to the regulations when applied here.

The Supreme Court also treated similar restrictions applied to civilian political campaigning as time, place, and manner restrictions in *Greer* v. *Spock* 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The question there was whether uninvited civilians could come on the base, where they had no clear right to be, for political purposes. That is quite a different question from that of direct restraints upon the exercise by military personnel of the right of free speech.

It may be argued that the challenged regulations cover activity, such as petitioning in a combat zone, on which the military may legitimately impose prior restraints. The regulations are nevertheless void because they are overbroad. Since they affect Glines' activities, he has standing to challenge their overbreadth. *Parker* v. *Levy*, 417 U.S. at 760-61, 94 S.Ct. 2547; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Overbreadth appears from a cursory reading. The regulations deal with protected expression and could cover virtually all controversial written material. The commanding officer makes the decisions, and his views are centered on his command, not on abstract First Amendment values. The regulations, indeed, allow him to prohibit distribution partly because "the material is critical of Government policies or officials." AFT 35-15(a)(4). Glines' case itself shows that commanding officers may be unsympathetic to even the most innocuous exercise of First Amendment rights. Finally, the restrictions exceed anything essential to the government's interests. *United States* v. *O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967). The regulations are valid, if at all, only in the limited setting of a combat zone. Their overbreadth is substantial.[9] *Broadrick* v. *Oklahoma*, 413 U.S. at 615-16, 93 S.Ct. 2908.

IV. *Jurisdiction to Award Damages*

For the reasons we have already given, we hold that the district court was correct in declaring the regulations void, enjoining their enforcement, and ordering Glines reinstated in a status that is consistent with his status before he was relieved from active duty. How-

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[9] The majority in *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. at 331-332, 511 F.2d at 1333-34, also questioned the regulations' breadth but stopped short of a finding of overbreadth. Judge Bazelon, dissenting, viewed them as invalid, as applied, and overbroad. 167 U.S.App.D.C. at 333, 511 F.2d at 1335.

ever, it lacked jurisdiction to award him back pay, and we must vacate that part of its judgment.

Under the Tucker Act, a district court has jurisdiction to award damages against the United States to a maximum of $10,000. All other monetary claims must go to the Court of Claims. 28 U.S.C. § 1343(a)(2). There is no such restriction on actions seeking nonmonetary relief or actions claiming that a government official acted in violation of the Constitution or of statutory authority. The reason is that in these situations Congress has either waived sovereign immunity or the doctrine does not apply. 5 U.S.C. § 702; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-91, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Hill* v. *United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); 14 Wright, Miller, and Cooper, Federal Practice and Procedure § 3655 (Supp. 1977). These doctrines justify the district court's judgment except for its award of back pay. Since the Court of Claims is without jurisdiction to grant general declaratory or equitable relief, the district court had no reason to defer to it. 28 U.S.C. § 1491; *United States* v. *Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States* v. *King*, 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969).

Congress has waived sovereign immunity when damages will be paid from the public treasury only if the claimant sues under the Tucker Act in the proper court. Glines did not plead Tucker Act jurisdiction, and in any event the district court awarded him an amount in excess of its Tucker Act authority. While

a district court may give damages as an incident to a declaratory judgment, it may do so only if such relief would otherwise be within its jurisdiction. 28 U.S.C. §§ 2201, 2202; *United States* v. *King*, 395 U.S. at 3-4, 89 S.Ct. 1501.

Glines argues that sovereign immunity is inapplicable, and the district court therefore had jurisdiction under 28 U.S.C. § 1331, because he alleged that the regulations are unconstitutional and in violation of a statute. He cites *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, in support of his position. However, he does not come within the *Larson* exception to sovereign immunity. The Supreme Court specifically noted in *Larson* that a suit would still fail as against the sovereign if relief would require affirmative action or the disposition of sovereign property. 337 U.S. at 691 n.11, 69 S.Ct. 1457. Glines' action is of this nature. His relief must come from the Court of Claims. The government, of course, could not relitigate in that forum any issues which have been decided against it here.

We affirm the judgment of the district court except for its award of back pay. We vacate that award and remand it to the district court with instructions either to dismiss the claim without prejudice to another action in the Court of Claims or to transfer that part of the case to the Court of Claims directly. *Sherar* v. *Harless*, 561 F.2d 791, 794 (9th Cir. 1977).

Affirmed in part: vacated and remanded in part.

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-599

SECRETARY OF THE NAVY, ET AL.,
Petitioners

—*v.*—

PRIVATE FRANK L. HUFF, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 10, 1978
CERTIORARI GRANTED MARCH 19, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-599

SECRETARY OF THE NAVY, ET AL.,
Petitioners

—*v.*—

PRIVATE FRANK L. HUFF, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

RELEVANT DOCKET ENTRIES

DATE	
1975	
Jan 10	Complaint, appearance, exhibits A, B, C, D & E. #1 ser. 1-14-75; #2 ser. 1-20-75.
Jan 10	Summons, copies (6) and copies (6) of complaint issued. USA & AG ser. 1-13-75.
Jan 10	REQUEST by pltf. for clerk to make service of summons, complaint & exhibits to defts. #5 & 6 pursuant to Rule 4.
Jan 10	SUMMONS, copies (2) and copies (2) of complaint issued to defts. #5 & 6.
Jan 10	CERTIFICATE of mailing by clerk as to defts. #5 & 6.
Mar 13	AMENDMENT to complaint as to the body of the complaint; c/m 3-13-75.
Mar 14	ANSWER of defts. to complaint; c/m 3-14-75. Appearance of Michael A. Katz as counsel.
Mar 14	CALENDARED. CAL/N
Mar 19	ANSWER of defts. to amended complaint; c/m 3-19-75.
Apr 14	MOTION by pltffs. for certification of class action; P&A; c/s 4-14-75.
Apr 14	STATUS CALL. (Rep. Eugene Olsen) Parker, J.
Apr 25	STIPULATION extending time for defts. to respond to motion of pltf. for certification of class action to 5-8-75. (N) Parker, J.
May 7	MEMORANDUM of points & authorities by defts. in opposition to motion of pltfs. for certification of class action; c/m 5-7-75.
May 29	CALENDAR CALL. (Rep. Eugene Olsen) Parker, J.

DATE

June 13 REPLY Memorandum by pltffs. of points and authorities in support of pltffs' motion for certification of class action; c/m 6-13-75.

June 25 STATUS CALL. (Rep. Eugene Olsen) Parker, J.

Jul 17 ORDER certifying case as a class action. (N) Parker, J.

Aug 8 STIPULATION extending time for filing motion of Pltf. for summary judgment until 8-18-75, approved. (N) Parker, J.

Aug 18 MOTION by defts. for extension of time to file cross-motion for summary judgment; P&A; c/m 8-18-75.

Aug 19 STIPULATION extending time for filing motion of Pltfs. for summary judgment until 9-22-75. (N) Parker, J.

Aug 21 ORDER granting motion of Defts. for extension of time; extending time for Defts. to file cross-motion until 9-19-75. (N) Parker, J.

Aug 22 MOTION by pltffs' for summary judgment; Statement; P&A; Appendices I thru VIII; c/m 8-22-75.

Aug 28 CHANGE of address for David F. Addlestone, counsel for pltff. CAL/N

Sept 19 MOTION by defts. for extension of time to file cross-motion for summary judgment; P&A; c/m 9-19-75.

Sept 22 ORDER granting motion of Defts. for extension of time in which to file their cross-motion for summary judgment until 9-23-75. (N) Parker, J.

Sept 23 CROSS-MOTION of defts. for summary judgment; Statement; P&A; Exhibit A, B, C, D, E, F, G, H, I, J; c/m 9-23-75.

Nov 25 CHANGE of address for Alan Dranitzke to 400 Woodward Bld., 733 15th St., N.W. 20005. c/m. CAL/N

DATE

1976

May 5 MOTION of pltfs. for summary judgment taken under advisement. Motion of defts. for summary judgment taken under advisement. Pltfs. are to submit by 5/6/76 memoranda of cases on which they rely. Defense counsel is to advise Court if any of the pltfs. were discharged other than honorably. (Rep. Eugene Olsen) Parker, J.

May 6 SUPPLEMENTAL MEMORANDUM BY pltfs. in support of pltfs. motion for summary judgment; c/s 5/6/76.

May 21 MEMORANDUM OPINION granting in part and denying in part motion of pltffs. for summary judgment and directing pltffs. counsel to submit appropriate order. (N) Parker, J.

May 26 ORDER filed May 25, 1976 amending the Memorandum Opinion of 5-21-76, *sua sponte*. (See order for details) (N) Parker, J.

May 28 ORDER filed May 27, 1976 granting in part and denying in part pltffs. motion for summary judgment. (N) Parker, J.

July 2 TRANSCRIPT of proceedings on May 5, 1976, pages 56. Court Copy. Rep. M. Eugene Olsen.

Jul 26 NOTICE of Appeal by defts. from judgment entered May 26, 1976; Gov't No Fee; copies sent to David F. Addlestone and Alan Dranitzke.

Sept 7 RECORD on Appeal delivered to USCA; Receipt acknowledged. USCA No. 76-1828)

DATE	
1977	
Feb 1	ORDER filed Jan. 31, 1977 amending the Court's order dated 5-27-76; granting in part and denying in part; motion of pltfs. for summary judgment; granting in part and denying in part motion of defts. for summary judgment and that this order is final and judgment shall be entered accordingly. (See order for details) (N) Parker, J.
1978	
Jun 7	CERTIFIED copy of USCA Order affirming judgment in part and also vacating judgment of the District Court, in part, and remanding case to the District Court with directions to revise its judgment in the manner indicated, in accordance with the opinion filed herein; opinion.
Oct 31	ORDER filed Oct. 30, 1978 revising Order of this Court dated 5-27-76, as amended by the Order dated 1-31-77, pursuant to the direction of the U.S. Court of Appeals. (See order for details) (N) Parker, J.
Nov 27	CHANGE of address for Alan Dranitzke, counsel for pltffs. to 1712 N St., N.W., 20036, Ph. 331-1614. CAL/N.

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND MANDAMUS

Plaintiffs, Frank L. Huff, Robert A. Falatine, and Robert E. Gabrielson, for their complaint against the defendants, Secretary of the Navy, Commandant of the Marine Corps, Commander-in-Chief U.S. Pacific Fleet, Commanding General Fleet Marine Force Pacific, Commanding General First Marine Aircraft Wing, and Commanding Officer U.S. Marine Corps Air Station, allege:

1. This action arises under the First and Fifth Amendments to the Constitution of the United States and 10 U.S. Code § 1034. The jurisdiction of this Court exists under 28 U.S. Code §§ 1331, 1361, and 2201. The matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs and arises under the laws of the United States.

2. Plaintiffs are United States citizens and members of the United States Marine Corps stationed at the Marine Corps Air Station, Iwakuni, Japan. The plaintiffs sue to restrain the defendants from denying their rights under the First Amendment to the Constitution and to declare 1st Marine Aircraft Wing Order 5370.1A, Marine Corps Air Station (Iwakuni, Japan) Order 5370.3A, Fleet Marine Force Pacific Order 5370.3, and Commander-in-Chief, U.S. Pacific Fleet Instruction 5440.3C unconstitutional on their face and as applied.

3. The defendant, Secretary of the Navy, is the administrative head of the Navy and the Marine Corps and is charged by law with supervising and prescribing the rules and regulations for the administration of the Navy and the Marine Corps. The defendant, Commandant of the Marine Corps, is the military head of the Marine Corps. The defendant, Commander-in-Chief U.S. Pacific Fleet, is the military head of the Pacific Fleet. The defendant, Commanding General Fleet Marine Force Pacific, is the military head of the Fleet Marine Force in the Pacific. The defendant, Commanding General 1st Marine Aircraft Wing, is the military head of the 1st

Marine Aircraft Wing. The defendant, Commanding Officer U.S. Marine Corps Air Station, is the military head of the Marine Corps Air Station Iwakuni, Japan.

4. 1st Marine Aircraft Wing Order (hereinafter MAWO) 5370.1A and Marine Corps Air Station, Iwakuni, Japan Order (hereinafter MCASO) 5370.3A, both dated December 14, 1973, are identical and read, in pertinent part, as follows:

> "(2) No member of this command will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, hand bills, flyers, or other similar printed or written materials on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or aboard any military installation, while in a duty status or non duty status, in uniform or out of uniform, or anywhere within a foreign country, regardless of uniform or duty status unless prior command approval is obtained."

5. Fleet Marine Force Pacific Order (hereinafter FMFO) 5370.3 of April 1, 1974 reads, in pertinent part, as follows:

> "b. No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained."

6. Commander-in-Chief, Pacific Fleet Instruction (hereinafter CINCPACFLTINST) 5440.3C of March 19, 1974, reads, in pertinent part, as follows:

> "(2) Pacific Fleet personnel shall not originate, sign, distribute or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers or other printed or written material, on board any ship, craft, aircraft or in any vehicle of the Department of the Navy, on any military installation, in a foreign country, on duty or in uniform unless prior command approval is obtained."

7. On or about May 2, 1974, plaintiff Huff, pursuant to MAWO 5370.1A, requested permission of defendant, Commanding General, 1st Marine Aircraft Wing, to distribute for signatures in his barracks a petition to Senator Alan Cranston regarding the use of members of the military and National Guard in labor disputes. A copy of the petition is attached hereto as Exhibit A. Plaintiff Huff also requested permission to distribute in a designated off-base area copies of an article on the use of Article 138 of the Uniform Code of Military Justice. Plaintiff Huff stated that the petitioning and distribution would be accomplished out of uniform and during off-duty hours, would involve the use of no government materials, and would not interfere with the performance of duties of any military personnel.

8. On or about May 3, 1974, subsequent to plaintiff Huff's submission of the request to distribute the petition and article, Lieutenant Colonel N. A. Smith, Commanding Officer of Headquarters & Maintenance Squadron 15, terminated plaintiff Huff's access to classified material and transferred plaintiff from his duties in the Classified Material Control Center. Since such date, plaintiff Huff has been removed from normal military duties and assigned menial tasks.

9. On or about May 20, 1974, defendant, Commanding General, 1st Marine Aircraft Wing, denied both requests of plaintiff Huff. Defendant Commanding General stated that the petition "contains gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces . . ." and that granting permission to distribute the petition "would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command." He denied permission to distribute

the article because the copyright release submitted was considered insufficient evidence to demonstrate that the article had been released by the copyright holder.

10. On or about May 8, 1974, plaintiff Falatine, pursuant to MAWO 5370.1A and MCASO 5370.3A, requested permission from the defendants, Commanding General, 1st Marine Aircraft Wing and Commanding Officer, Marine Corps Air Station, Iwakuni, Japan, to distribute for signatures either on or off base a petition to Congressperson Ronald Dellums regarding amnesty for Viet Nam war resisters. A copy of the petition is attached hereto as Exhibit B.

11. On or about May 20, 1974, defendant, Commanding General, 1st Marine Aircraft Wing, denied plaintiff Falatine's request, stating that the petition contained "gross misstatements and implications of law and fact. In addition, it impugns by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces. . . To authorize permission to circulate . . . would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command."

12. On or about June 24, 1974, plaintiff Huff and plaintiff Falatine separately requested, pursuant to MAWO 5370.1A, permission from the defendant, Commanding General, 1st Marine Aircraft Wing, to distribute copies of a leaflet containing the Declaration of Independence and the First Amendment to the Constitution, while off-duty and out of uniform. Plaintiff Huff requested permission to distribute off-base whereas plaintiff Falatine requested permission to distribute on-base. A copy of the leaflet is attached hereto as Exhibit C.

13. On or about July 1, 1974, defendant, Commander General, 1st Marine Air Wing, granted plaintiff Huff's request to distribute said leaflet. However, on that same date, defendant, Commanding General, 1st Marine Aircraft Wing, denied plaintiff Falatine's request to distribute that same leaflet, stating that the introductory paragraph to the leaflet was "disrespectful and contemptuous of all of your superiors, officers, noncommissioned officers and civilians alike" and constituted "a clear

hazard to the discipline and morale within the 1st Marine Aircraft Wing."

14. On or about July 12, 1974, plaintiffs Huff and Falatine, while off-base, off-duty, and out of uniform, showed to fellow Marines a proposed letter to Senator J. William Fulbright concerning United States support of the South Korean government. A copy of the letter is attached hereto as Exhibit D. Not wishing to violate MAWO 5370.1A/MCASO 5370.3A, plaintiffs Huff and Falatine did not distribute copies of the letter, but merely exhibited the letter to interested persons. Nevertheless, both plaintiffs were arrested by military police and charged, pursuant to Article 92 of the UCMJ, with violating MAWO 5370.1A/MCASO 5370.3A.

15. Following a trial by court martial in August 1974, plaintiff Huff was found guilty of violating the orders and was sentenced to sixty days confinement, forfeiture of half pay for two months, and reduction in rank from E-3 to E-1, the lowest enlisted grade. The charges against plaintiff Falatine were dismissed.

16. On or about July 30, 1974, plaintiff Gabrielson requested permission of defendant, Commanding Officer, Marine Corps Air Station, Iwakuni, Japan, to distribute in certain designated areas off-base near the main gate and on-base in the "B" barracks area, while off-duty and out of uniform, copies of the proposed letter to Senator J. William Fulbright concerning United States support of the South Korean government (Exhibit D) and a statement on the prior arrests of plaintiffs Huff and Falatine for displaying a copy of the same letter to Senator Fulbright. A copy of the statement is attached hereto as Exhibit E.

17. On or about August 6, 1974, defendant, Commanding Officer, Marine Corps Air Station, Iwakuni, partially granted plaintiff Gabrielson's request to distribute copies of the letter and the statement in a designated on-base area. However, permission was denied to distribute the materials in the barracks itself and plaintiff Gabrielson was prohibited from engaging "in argument or debate of the issue presented in your material." Plaintiff Gabrielson's request to distribute both materials

off-base was denied because it was considered by defendant Commanding Officer "a form of political activity within the host country" which was prohibited by the Status of Forces Agreement between the United States and Japan. (Article XVI, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 11 U.S.T. 1652, TIAS 4510, January 19, 1960).

18. The promulgation, interpretation, and administration of the challenged orders by defendants are arbitrary and capricious. Further, defendants have arbitrarily and capriciously misinterpreted the Status of Forces Agreement to include political activity of Marine personnel concerning United States affairs directed towards United States citizens.

19. Plaintiffs wish to distribute petitions to members of Congress, leaflets, and newspapers both on-base and off-base while off-duty and out of uniform. Defendants, Commanding General, 1st Marine Aircraft Wing and Commanding Officer, Marine Corps Air Station Iwakuni, pursuant to the challenged Orders and Instruction, have required and continue to require plaintiffs to submit all such material for command approval before engaging in any petitioning or distribution, regardless of the circumstances.

20. Because of the challenged Orders and Instruction, plaintiffs are restricted and intimated from exercising rights guaranteed to them by the First Amendment of the Constitution and 10 U.S.C. § 1034. Plaintiffs fear command harassment if they continue to submit written materials for command approval or censorship prior to distribution; plaintiffs fear criminal prosecution under the challenged Orders and Instruction if they attempt any such political activity without prior approval.

21. MCASO 5370.3A, MAWO 5370.1A, FMFO 5370.3 and CINCPACFLTINST 5440.3C are unlawful on their face and/or as applied in this case in that they:

(a) place an unconstitutional prior restraint on plaintiff's First Amendment rights of freedom of speech, press,

and association and right to petition the government for redress of grievances;

(b) are unconstitutionally broad and vague in that they appear to prohibit virtually all writing and exchange of written material by plaintiffs and all members of the Marine Corps at any time while under the authority of defendants;

(c) are applied in an arbitrary and capricious manner;

(d) violate plaintiffs' rights under the due process clause of the Fifth Amendment to the Constitution;

(e) violate 10 U.S. Code § 1034, which provides: "No person may restrict any member of the Armed Forces in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States," and DOD Directive 1344.10, which guarantees the right of military personnel to "[s]ign a petition for specific legislative action."

(f) violate and exceed the scope of DOD Directive 1325.6, OPNAV Instruction 1620.1, and Marine Corps Order 5370.4, which guarantee the right of service members to write, publish, and distribute material off-base while off-duty and out of uniform;

(g) exceed the scope of the Status of Forces Agreement with Japan, which does not apply to political activity of Marines concerning United States affairs directed towards United States citizens.

22. The plaintiffs fear harassment from their superior officers as a result of the filing of this Complaint.

23. Unless this Court grants the relief requested, plaintiffs will continue to suffer irreparable injury and will be denied the exercise of their First Amendment rights.

24. The plaintiffs have exhausted their administrative remedies and have no adequate remedy at law.

WHEREFORE, plaintiffs pray for judgment as follows:

(1) Declaring that 1st Marine Aircraft Wing Order 5370.1A, Marine Corps Air Station (Iwakuni, Japan) Order 5370.3A, Fleet Marine Force, Pacific Order 5370.3, and Commander-in-Chief, Pacific Fleet Instruction 5440.3C

are unconstitutional on their face and as applied in violation of the First and Fifth Amendments to the United States Constitution;

(2) Declaring that MAWO 5370.1A, MCASO 5370.3A, FMFO 5370.3, and CINCPACFLTINST 5440.3C violate plaintiffs' rights under 10 U.S. Code § 1034 and DOD Directive 1344.10;

(3) Declaring that MAWO 5370.1A, MCASO 5370.3A, FMFO 5370.3, and CINCPACFLTINST 5440.3C violate DOD Directive 1325.6, OPNAV Instruction 1620.1, and MCO 5370.4;

(4) Declaring that Article XVI of the Status of Forces Agreement, Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 11 U.S.T. 1642, TIAS 4510 (January 19, 1960), is not a bar to the off-base distribution by Marines of printed materials concerning United States political affairs to United States citizens;

(5) Restraining defendants from continuing to deny plaintiffs their rights to freedom of speech, press, and association and their rights to petition Congress for redress of grievances under the First Amendment to the United States Constitution and under 10 U.S. Code § 1034;

(6) Entering its order in the nature of mandamus requiring defendants to perform their duty to protect and insure plaintiffs' constitutional and statutory rights by permitting plaintiffs to distribute petitions and other written materials not related to internal Japanese political affairs while off-base, off-duty, and out of uniform, by permitting plaintiffs to distribute for signature petitions to the Congress of the United States while on-base, off-duty, and out of uniform, and by permitting plaintiffs to distribute other written materials while on-base, off-duty, and out of uniform in the absence of a showing that distribution of such materials would result in a clear and present danger to the security of the military command;

(7) Declaring plaintiff Huff's conviction by the court martial to be invalid and directing the defendants to restore to plaintiff Huff all pay, benefits, and rank of which he was deprived by virtue of said conviction;

(8) Directing the defendants to expunge and destroy any reference to plaintiff Huff's and Falatine's arrests on July 12, 1974 and plaintiff Huff's subsequent conviction in plaintiffs' military personnel files, refrain from communicating the fact of the arrests and the conviction to any civilian or military law enforcement agency, and, if such information has been distributed, forward a correction to reflect the illegality of the arrests and the conviction;

(9) Issuing an order directing the defendants, their agents, and subordinates not to harass the plaintiffs because of their filing of this Complaint;

(10) Granting such other and further relief as the nature of the case may require and to the Court may seem just and proper.

/s/ Alan Dranitzke
ALAN DRANITZKE
Forer & Rein
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628-4047

/s/ David Rein
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West Germany

EXHIBIT A

PETITION TO CONGRESS

To Senator Alan Cranston:

We the undersigned working people and military men and women protest the use of soldiers and members of the National guard and military reserves to break strikes or otherwise go into action against Americans. Whever the military intervenes in labor disputes, it is on the side of the bosses and against the working people. There is no excuse for using working people in the military against striking workers.

We demand that you immediately propose legislation forbidding the use of any units of the United States armed forces or the National Guard in domestic disputes between working people and their employers.

NAME	HOME ADDRESS
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

EXHIBIT B

PETITION TO CONGRESSMAN RONALD DELLUMS FOR UNIVERSAL AND UNCONDITIONAL AMNESTY:

The American Government's recent war in Indochina has been opposed by a majority of the American People. Hundreds of thousands of men and women in the U.S. have suffered a loss of civil rights, liberty, and jobs because they have been in opposition to the war, or subjected to the racism and oppression of the American military and draft systems. Contrary to Nixon's deliberate distortion about the "few hundred" anti-war exiles, there are in fact 60,000 to 100,000 of them. But the MAJORITY of war resisters are INSIDE THE U.S. where an estimated 200,000 live underground. Thousands are behind bars; many have court records; and *over 500,000 veterans have less than honorable discharges.*

WHEREAS the intervention of the U.S. government in Indochina has been by presidential decree only, without a declaration of war by Congress;

WHEREAS, in conducting this war, we believe the U.S. has violated the UN Charter and the Geneva Accords of 1954 and 1962;

WHEREAS, in conducting this war, the U.S. has violated the precedents set at the Nuremburg Trials; the war is and has been illegal;

GIVEN the illegal nature of this war, resistance to it was both the moral and legal responsibility of the American People. Therefore:

We the undersigned citizens demand universal and unconditional amnesty, with no alternative service or other punitive measures, or case-by-case judgement for:

1. All military resisters (so-called 'deserters') and draft resisters in exile or underground in the U.S.;

2. All people who are, or have been, in civilian and military prisons, or those who are sought for prosecution because of their opposition to the war—this includes a clearing of their records;
3. The more than half million veterans who have received less than honorable discharges for opposition to the war—this includes an upgrading of all discharges to a single universal level.

Name (no rank please)

....

....

....

....

....

EXHIBIT C

We Hold These Truths To Be Self-Evident

(But Do The Brass?)

In two years our country will have its 200th birthday. Many of the basic principles our country was founded upon like the Declaration of Independence and the First Amendment are really "Right On". Yet many of our "superiors" call anyone who tries to exercise his First Amendment right to freedom of speech and press a "communist". They also put down anyone who really believes in our Declaration of Independence which upholds the right of the citizens of any country to change their government when it becomes unresponsive to their needs and the idea that the people of a country should be able to choose their own form of government even if the leaders of our government disagree with their choice.

These principles are worth defending against their enemies wherever they are found. Check them out, they are really worth diggin' on. Since they are written in old style English, we've included modern interpretation.

THE DECLARATION OF INDEPENDANCE

WHEN IN THE COURSE OF HUMAN EVENTS IT BECOMES NECESSARY FOR ONE PEOPLE TO DISSOLVE THE POLITICAL BANDS WHICH HAVE CONNECTED THEM WITH ANOTHER, AND TO ASSUME AMONG THE POWERS OF THE EARTH, THE SEPARATE AND EQUAL STATION TO WHICH THE LAWS OF NATURE AND OF NATURE'S GOD ENTITLE THEM, A DECENT RESPECT TO THE OPINIONS OF MANKIND REQUIRES THAT THEY SHOULD DECLARE THE CAUSES WHICH IMPEL THEM TO THE SEPARATION.

WE HOLD THESE TRUTHS TO BE SELF-EVIDENT, THAT ALL MEN ARE CREATED EQUAL, THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN UNALIENABLE RIGHTS, THAT

AMONG THESE ARE LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS.

THAT TO SECURE THESE RIGHTS, GOVERNMENTS ARE INSTITUTED AMONG MEN, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED,—THAT WHENEVER ANY FORM OF GOVERNMENT BECOMES DESTRUCTIVE OF THESE ENDS, IT IS THE RIGHT OF THE PEOPLE TO ALTER OR TO ABOLISH IT, AND TO INSTITUTE A NEW GOVERNMENT, LAYING ITS FOUNDATION ON SUCH PRINCIPLES AND ORGANIZING ITS POWERS IN SUCH FORM, AS TO THEM SHALL SEEM MOST LIKELY TO EFFECT THEIR SAFETY AND HAPPINESS.

PRUDENCE, INDEED, WILL DICTATE THAT GOVERNMENTS LONG ESTABLISHED SHOULD NOT BE CHANGED FOR LIGHT AND TRANSIENT CAUSES: AND ACCORDINGLY ALL EXPERIENCE HATH SHOWN THAT MANKIND ARE MORE DISPOSED TO SUFFER WHILE EVILS ARE SUFFERABLE, THAN TO RIGHT THEMSELVES BY ABOLISHING THE FORMS TO WHICH THEY ARE ACCUSTOMED.

BUT WHEN A LONG TRAIN OF ABUSES AND USURPATIONS PURSUING INVARIABLY THE SAME OBJECT, EVINCES A DESIGN TO REDUCE THEM UNDER ABSOLUTE DESPOTISM. IT IS THEIR RIGHT, IT IS THEIR DUTY, TO THROW OFF SUCH GOVERNMENT, AND TO PROVIDE NEW GUARDS FOR THEIR FUTURE SECURITY.

Modern Interpretation

When a group of people decide that they want to set up their own government, the decent thing for them to do, is to explain to everyone why they feel this way.

Some things are obviously true—that all people are created equal, that everyone has the same basic rights including the right to life, liberty and the pursuit of happiness.

Governments are set up and given power by the people they govern in order to make sure that everyone gets these rights. Whenever people feel that they are not getting their rights, then the people have the right to change the government to make them safer and happier.

Governments that have been around a long time shouldn't be changed by whim or for minor reasons, but history has shown that people tend to put up with governments' wrong-doing for as long as they can stand it before they think about changing it all.

But, when for a long time the government abuses it's power, disregards the will of the people, and seems to be becoming a dictatorship, then it is the right, it is the duty, of the people to overthrow the government and to design a new government that will serve them properly.

THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE TO PEACEABLY ASSEMBLE AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

Modern Interpretation

Our government shall not take away our right to believe, say, or print whatever we wish. Also the government can not take away our right to circulate petitions and participate in peaceful demonstrations asking it to change its actions.

EXHIBIT D

Senator J. W. Fulbright
1215 Dirksen (HSOB) Bldg.
Washington, D.C. 20510

Dear Senator Fulbright:

I am writing to you as a citizen who is concerned about the effects and implications of American foreign policy toward the Pak regime of South Korea. I understand that American tax dollars and the U.S. military presence in South Korea are being used to support an anti-democratic dictatorship in South Korea.

In particular, I am upset about the present court-martials of 55 people—all civilians, and including the Japanese graduate students—being charged under President Pak's "Emergency Measure 4" of April 3rd. I understand that at least 7 of these people face death sentences in these court-martials being held under martial law.

I also understand that one man being tried, Kim Jiha, is a South Korean poet. He now faces the death penalty for the "crime" of acting as middleman for a donation from a Korean Catholic to the National Federation of Democratic Youth and Students—an organization which the Pak regime claims is operating as a "first stage in north Korean maneuverings to communize the country," and poses a serious threat to national security. People close to youth and students in South Korea claim that this "federation" was simply the name that students at various schools concerned about the disappearance of democratic rights in South Korea had agreed to put at the bottom of their leaflets.

Since the American government is supporting the Pak regime in South Korea with money and military power, we cannot claim that this matter is "out of our hands" on the grounds that the issue is a matter of the internal affairs of South Korea. I want you to start a Congressional investigation into the court-martials of Kim Jiha and others being prosecuted under Pak's emergency

measures. As I sign this letter, Kim Jiha and other Korean patriots may be sentenced to death and executed.

ALL KOREAN POLITICAL PRISONERS MUST BE FREED. ALL COURT-MARTIALS AGAINST KOREAN PATRIOTS MUST BE STOPPED. THE LIVES OF THOSE IN SOUTH KOREA SPEAKING OUT FOR DEMOCRATIC RIGHTS MUST BE SAVED. If not, the words "freedom" and "democracy" will have been made a mockery of once more under an American-supported regime.

In earnest concern,

EXHIBIT E

IWAKUNI FIVE TAKEN TO COURT FOR TRYING TO HELP KOREAN PATRIOTS

Five Marines at Iwakuni are being given Special Court Martials for showing other people a copy of an individual letter to Senator J. W. Fulbright about the emergency court-martials being given to civilians in South Korea under Pak Chung Hee's Emergency Measure 4.

These Marines have joined concerned citizens from all over the world in protesting against the way South Korean president Pak has surpressed democratic rights in that country. Demonstrations on four continents on July 19 highlighted the upsurge of an international campaign protesting the punishments—ranging from 20 years imprisonment to the death sentence—meted out to 55 political prisoners by a South Korean military tribunal in early July.

As 1200 protest marchers rallied in Tokyo, similar demonstrations took place in New York, London, Sidney, Canberra, Melbourne and half a dozen other cities in Japan and abroad.

Rather than confront WgO 5370.1A/MCASO 5370.3A (which says we have to get prior command approval to distribute literature or circulate, sign or originate petitions, among other activities, whether on or off base, even while off duty by circulating a petition, the "Iwakuni Five" simply stood on the street showing others a copy of the attached individual letter to Senator Fulbright. More than 40 copies of this letter have already been sent to Senator Fulbright. You can sign this letter without fear of prosecution because it is an individual letter to Senator Fulbright, not a petition.

The Marines being court martialled are: LCPL Gerald W. McCauley, PVT Hugh G. Dalton, and LCPL Robert A. Falatine, all of Hdqtrs & Maint Sqdrn 17; PFC Patrick F. McDonald of Hdqtrs & Maint Sqdrn 12; and LCPL Frank Huff of Hdqtrs & Maint Sqdrn 15.

Since military court martials are supposed to be opened to the public, and you are part of the public, *you should have the right to attend the court martials* of the Iwakuni Five. So if you are interested, ask to get off duty with this right as your reason. If you don't have duty during the trials, just come to the second floor of Wing Legal, where the trials will be held.

The trials will probably start early in August. The Iwakuni Five Defense Committee will be distributing literature (legally) to keep everyone up to date about trial dates and what is happening with the trials. All five defendants have retained Chris Coates, a civilian lawyer associated with the National Lawyers Guild/ Military Law Office who is living in Iwakuni, to defend them at their court martials.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-43

PRIVATE L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

AMENDMENT TO COMPLAINT

Plaintiffs, by their counsel, amend their Complaint as of course pursuant to the provisions of Rule 15(a), Federal Rules of Civil Procedure, as follows:

1. The following sentence is added to Paragraph 1 of the Complaint: This action is brought on behalf of the plaintiffs and on behalf of all other members of the Marine Corps stationed at, assigned to, or on duty at Marine Corps Air Station, Iwakuni, Japan.

2. The following paragraphs are added numerically after Paragraph 6 of the Complaint:

Class Action Allegations

6A. Plaintiffs bring this suit as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

6B. Members of plaintiff class, consisting of all Marine Corps personnel stationed at, assigned to, or on duty at the Marine Corps Air Station, Iwakuni, Japan, are so numerous as to make it impracticable to bring them before the Court. Upon information and belief, plaintiff class consists of approximately 5,000 people.

6C. There are questions of law and fact presented herein which are common to the entire class of persons represented by the plaintiffs and which predominate over any questions affecting only individual members. All members of the class are equally subject to the aforementioned regulations complained of by the plaintiffs

and have the same legal basis for challenging said regulations.

6D. Defendants, by promulgating and enforcing the aforementioned regulations, have acted on grounds generally applicable to the entire class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

6E. Plaintiffs can fairly and adequately protect the interests of the entire class. Plaintiffs have in good faith endeavored to use the administrative and legal process to assert and protect their constitutional rights and the rights of their fellow Marines. Plaintiffs are represented by attorneys who are experienced in this area of constitutional litigation.

6F. Plaintiffs know of no interest of members of the class in individually controlling separate actions. Plaintiffs know of no difficulties likely to be encountered in management of the class action.

/s/ Alan Dranitzke
ALAN DRANITZKE
DAVID REIN
DAVID ADDLESTONE
Attorneys for Plaintiffs

Certificate of Service

I certify that on this 13th day of March, 1975, I served the foregoing Amendment by mailing a true copy thereof, first class, postage pre-paid, to Michael A. Katz, Assistant United States Attorney, United States Courthouse, Washington, D.C. 20001.

/s/ Alan Dranitzke
ALAN DRANITZKE

APPENDIX IV

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0043

PRIVATE FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

AFFIDAVIT OF FRANK L. HUFF

I, Frank L. Huff, being duly sworn, do depose and say:

1. I am Frank L. Huff, 549-82-3479, a Private in the U.S. Marine Corps assigned to the First Marine Aircraft Wing at Marine Corps Air Station, Iwakuni, Japan.

2. I have read and hereby verify the complaint in the above-captioned action and attest to its contents.

3. On May 2, 1974, in compliance with First Marine Aircraft Wing Order 5370.1A/Marine Corps Air Station Order 5370.3A, I submitted a request to the Commanding General, 1st Marine Aircraft Wing for permission to distribute in my barracks a petition to Senator Alan Cranston regarding the use of members of the military and National Guard in labor disputes. (A copy of the petition was submitted to the Court as Exhibit A to the complaint.) In that same letter, I also requested permission to distribute off-base outside the main gate of the Air Station copies of an article on the use of Article 138 of the Uniform Code of Military Justice. I stated that the distribution and petitioning would be accomplished while out of uniform and off-duty, would involve the use of no government materials, would not interfere with pedestrian or vehicular traffic and would not interfere with the performance of duties of any military personnel. A copy of said letter is attached as Exhibit 1 to this affidavit.

4. On or about May 22, 1974, I received a response from Gen. V. A. Armstrong, Commanding General, 1st Marine Aircraft Wing, denying both my requests of May 2. Gen. Armstrong stated that the petition to Sen. Cranston "contains gross mistatements and implications of law and fact" and that to allow its distribution "would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command." He denied permission to distribute the article because he said that the copyright release was insufficient. A copy of said letter is attached as Exhibit 2 to this affidavit.

5. On May 3, 1974, subsequent to my request to distribute the petition and article, I was informed that Lt. Col. N. A. Smith, commanding officer of Headquarters and Maintenance Squadron 15, had terminated my access to classified material. I was also transferred from my duties in the Classified Material Control Center to menial assignments. On May 15, 1974, I was assigned to duties at a dining facility on the Air Station.

6. On May 9, 1974, I submitted a letter of redress pursuant to Article 138 of the Uniform Code of Military Justice to Lt. Col. Smith, requesting that my access to classified material be reinstated. A copy of said letter is attached as Exhibit 3 to this affidavit.

7. On May 14, 1974, I received a response from Lt. Col. Smith, denying my request. Lt. Col. Smith stated that the termination of my security access was due to my involvement with "Semper Fi", an unofficial G.I. newspaper. A copy of said response is attached as Exhibit 4 to this affidavit.

8. On May 24, 1974, I submitted to the Commanding General, 1st Marine Aircraft Wing, a petition for redress of grievances pursuant to Article 138 of the UCMJ, requesting that 1st Marine Aircraft Wing Order 5370.1A (WgO 5370.1A) and Marine Corps Air Station Order 5370.3A (MCASO 5370.3A) be rescinded as violative of the First Amendment to the U.S. Constitution. A copy of said letter is attached as Exhibit 5 to this affidavit.

9. On June 27, 1974, I received a reply from Gen. V. A. Armstrong, Commanding General, 1st Marine Aircraft Wing, denying me redress of grievances. A copy of said reply is attached as Exhibit 6 to this affidavit.

10. On July 26, 1974, I submitted for redress of grievances pursuant to Article 138 of the UCMJ to the Commandant of the Marine Corps, requesting that WgO 5370.1A be rescinded. A copy of said letter is attached as Exhibit 7 to this affidavit.

11. On November 11, 1974, the Commanding General, Fleet Marine Force Pacific, stated in a letter to the Secretary of the Navy via the Commandant of the Marine Corps that my Article 138 complaint was "without merit." A copy of said letter is attached as Exhibit 8 to this affidavit.

12. On June 24, 1974, pursuant to WgO 5370.1A/ MCASO 5370.3A, I requested permission from the Commanding General, 1st Marine Aircraft Wing, to distribute copies of a leaflet containing the Declaration of Independence and the First Amendment to the U.S. Constitution. I sought to distribute the leaflet outside the main gate while off duty and out of uniform. Robert A. Falatine, my co-plaintiff in this action, requested permission on the same date to distribute the same leaflet at certain designated areas on base. (A copy of the leaflet was submitted to the Court as Exhibit C to the complaint.)

13. On July 1, 1974, Gen. V. A. Armstrong granted me permission to distribute the leaflet at designated times from July 2 through July 6. A copy of Gen. Armstrong's letter is attached as Exhibit 9 to this affidavit. On the same date, co-plaintiff Falatine was denied permission to distribute the same leaflet on base because the leaflet constituted "a clear hazard to the discipline and morale within the 1st Marine Aircraft Wing."

14. On or about July 12, 1974, I along with several other Marines, while off-base, off-duty and out of uniform, showed a copy of a proposed letter to Senator J. William Fulbright concerning United States support for the South Korean government to other Marine Corps personnel outside the main gate of the Air Station. (A copy of the letter was submitted to the court as Exhibit D to the complaint.) Not wishing to violate WgO 5370.

1A/MCASO 5370.3A, I purposely did not distribute copies of the letter or ask for signatures; I merely showed it to interested Marines. In spite of these precautions to avoid disobedience of the regulations, I was arrested by military police and charged with violating WgO 5370.1A/MCASO 5370.3A.

15. Following Special Court Martial proceedings in August, 1974, I was convicted of 2 counts under Article 92 of the UCMJ of violating the regulations and sentenced to 60 days confinement at hard labor, forfeiture of half pay and reduction in rank from E-3 to E-1, the lowest enlisted grade.

16. It is my belief that Marine Corps authorities maintain records of my arrest and conviction, and that such records will jeopardize my chances for future employment and other opportunities as well as for promotion and desirable assignments within the Marine Corps.

17. I continue to desire to distribute petitions to the U.S. Congress, copies of the *Semper Fi* newspaper and information on subjects of general interest to members of the Marine Corps, including amnesty for American war resisters and the Constitutional rights of members of the U.S. armed forces.

18. I believe that I have a right under the First Amendment to the Constitution and 10 U.S. Code Section 1034 to circulate for signature petitions to the U.S. Congress while on-based and off-duty, without seeking command approval, as long as I do not interfere in the performance of any military duties or operations.

19. I believe that I have a right to distribute petitions and other literature to Marine Corps personnel while off-base, off-duty and out-of-uniform without command approval as long as I do not involve myself in Japanese government or politics.

20. I do not wish to distribute any material relating to Japanese politics or the conduct of the government of Japan. I believe that the distribution of information on American affairs to American military personnel falls outside the prohibition on Americans participating in Japanese political activity as contained in the Status of Forces Agreement between the United States and Japan.

21. I fear that I will be subject to further arrest and prosecution if I continue to exercise my lawful

rights under the First Amendment to the United States Constitution.

22. I believe that WgO 5370.1A/MCASO 5370.3A are unlawfully vague and overbroad as evidenced by my arrest on July 12, 1974 despite my efforts to comply with the language of the regulations. Further, the regulations on their face appear to present virtually all non-oral communicative activity by Marines. For example, activities such as passing around a copy of a sports magazine, writing poetry or co-signing a letter to the editor of a publication appear to be prohibited without prior command approval.

23. I believe that in reviewing requests to distribute written material, the Commanding General, 1st Marine Aircraft Wing, has acted arbitrarily and capriciously and has not been governed by ascertainable standards. For example, on July 1, 1974, the Commanding General approved my petition to distribute a leaflet while simultaneously denying another request to distribute the same leaflet on the basis of its content (see par. 13 above).

24. By requiring me to follow cumbersome and time-consuming authorization procedures, by denying requests to distribute petitions to the U.S. Congress and other important information, and by subjecting me to arrest and prosecution merely for exhibiting a copy of a letter to a U.S. Senator, defendants in this action have drastically and unjustifiably curtailed my ability to exercise my First Amendment rights.

/s/ Frank L. Huff
FRANK L. HUFF

Sworn and subscribed to and before me on this 21st day of May, 1975, U.S. Marine Corps Air Station, Iwakuni, Japan.

/s/ Douglas C. Brown
DOUGLAS C. BROWN
Capt USMCR
Judge Advocate

Authorized to administer oaths and act as Notary Public under Article 136(a), Uniform Code of Military Justice; Title 10 USC, Sec. 936; and Public Law 86-589 approved 51st 60.

EXHIBIT 1

Headquarters and Maintenance Squadron 15
Marine Aircraft Group #5
First Marine Aircraft Wing
Fleet Marine Force Pacific
FPO San Francisco 96602

From: Lance Corporal Frank L. Huff, 549 82 3479/6639, USMC

To: Commanding General, First Marine Aircraft Wing

Via: (1) Commanding Officer, Headquarters and Maintenance Squadron 15

(2) Commanding Officer, Marine Aircraft Wing 15

Subj: Request for prior approval to circulate copies of Enclosure (1) and to distribute coipes of enclosure (2), as required by WgO 5370.1A/ MCASO 5370.3A

Ref: (a) WgO 5370.1A
(b) MCASO 5370.3A

Encl: (1) Petition to Senator Alan Cranston
(2) Leaflet in regard to Article 138, UCMJ
(3) Copy of copyright release

I, Frank L. Huff, in compliance with references (a) and (b) request permission to circulate enclosure (1) for signatures in my barracks, building 1671, MCAS, Iwakuni, Japan, and to distribute copies of enclosure (2) along the side of the street which runs from the main gate, MCAS, Iwakuni, Japan, to the area known as "Three Corners". These permissions are requested for the days of 10 May through 14 May, 1974, and for the time of 1630 hours to 2130 hours. I also request written assurance that servicepeople signing this petition, enclosure (1), will not be prosecuted for doing such.

This circulation and distribution will:

(a) be during off-duty hours and out of uniform;

(b) constitute no interference with the performance of my duties or the duties of other military personnel;

(c) involve the use of no government material;

(d) not result in the coercing of anyone to take or read or sign copies of enclosures (1) or (2);

(e) be done in such a way as to avoid interference with pedestrian and vehicular traffic;

(f) not involve the use of any stands;

(g) not involve the posting of any literature announcing this circulation or distribution;

(h) honor military courtesy; and

(i) not in any way result in my involvement in Japanese political affairs.

I respectfully request that this letter be forwarded up the chain until it reaches the person who has the full authority to approve or deny this request and that I receive a response to this request on or before 8 May, 1974. I thank you for your consideration in this matter and will be awaiting your prompt reply so that I may make arrangements for the circulation of enclosure (1) and distribtuion of enclosure (2).

Date: 2 May 74

/s/ Frank L. Huff
FRANK L. HUFF

EXHIBIT 2

[SEAL]

UNITED STATES MARINE CORPS
HEADQUARTERS
1st Marine Aircraft Wing, FMF
FPO, San Francisco, 96602

IN REPLY REFER TO:
17:MPM:gwb
5370
20 MAY 1974

From: Commanding General

To: Lance Corporal Frank L. HUFF, 549 82 3479/6639, U.S. Marine Corps

Via: (1) Commanding Officer, Marine Aircraft Group 15, Marine Aircraft Wing
(2) Commanding Officer, Headquarters and Maintenance Squadron 15, Marine Aircraft Group 15, 1st Marine Aircraft Wing

Subj: Request to circulate a petition and other printed matters

Ref: (a) Your letter of 2 May 1974

1. Reference (a), which requested permission to circulate a petition addressed to Senator Alan Cranston and to distribute a leaflet in regard to Article 138, UCMJ, was forwarded to me through your chain of command. Careful consideration has been given to the requests contained therein and with respect to each you are advised as follows:

a. The petition which you desire to circulate contains gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces in the exercise of his constitutional responsibilities. To authorize permission to circulate such grossly erroneous and misleading commentary would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command. Accordingly, your request to circulate the petition as submitted is not approved.

b. With respect to your request to distribute printed matter regarding Article 138, UCMJ, it is noted that the precise material you wish to distribute is taken verbatim from a copyrighted document entitled "Turning the Regs Around," which said copyright is held by the Bay Area Turning the Regs Around Committee (1973). Although you include in your letter (reference (a)) a copy of a note from some person purporting to be one Catherine M. Gates, which note purports to grant "permission" to a Private J. A. Kirchoff and others to reprint material from the cited pamphlet, there is no indication of the official relationship of the said Catherine M. Gates to the cited organization, nor of her legal authority to act in the capacity implied i.e., authority to grant permission to use copyrighted material. Accordingly, in the absence of a clear identification of the status and authority of the said Catherine M. Gates to so act, I cannot presume that requisite legal permission has been granted to utilize the material in question. If an affidavit, duly notarized, is obtained clarifying these points, then consideration can be given to the question of whether or not the proposed material is appropriate. Until then, however, this issue is not relevant, since no permission to distribute copyrighted material can be given due consideration until it has been clearly determined that such material has been lawfully released by the principal copyright holder or its, his or her authorized agent or attorney. Your request at this time is denied.

/s/ V. A. Armstrong
V. A. ARMSTRONG

EXHIBIT 9

[SEAL]

UNITED STATES MARINE CORPS
HEADQUARTERS
1st Marine Aircraft Wing, FMF
FPO, San Francisco, 96602

IN REPLY REFER TO:
17:WBD:gwb
5370
1 July 1974

From: Commanding General

To: Lance Corporal Frank L. HUFF, 549 82 34 79/6639, U.S. Marine Corps

Via: (1) Commanding Officer, Marine Aircraft Group 15
(2) Commanding Officer, Headquarters and Maintenance Squadron 15

Subj: Request to Distribute Leaflet; "We Hold These Truths to be Self-Evident (But Do the Brass?)"

Ref: (a) LCpl Huff's ltr of 24 June 1974

1. I have reviewed your request to distribute the leaflet contained in enclosure (1) of reference (a). Your request is approved.
2. You have specifically requested to distribute the subject leaflet along the sides of the street that runs from the Main Gate, Marine Corps Air Station, Iwakuni, Japan, to the area known as "Three Corners", and you have requested to make this distribution during your off duty hours and days during the period between 1700 and 1900 only on 2 July 1974 through 6 July 1974. As such, those are the limits of your permission. In addition, you are to insure that the document that you distribute is *precisely* the document that you have requested permission to distribute. Additionally, you are to insure that the distribution is made in such a way as to constitute no interference with the performance of any of your

duties or the duties of any other personnel, that no government material will be used, that you will not coerce anyone to take or read copies of the subject leaflet, that you will avoid interference with pedestrian and vehicular traffic, that you will not use any stands, and that you will not post any literature announcing the distribution.
3. Although this permission extends to the period described in paragraph 2 above, should you have any military duties to perform during these periods, this permission is not to be construed to permit you to avoid those duties in anyway whatsoever.

/s/ V. A. Armstrong
V. A. ARMSTRONG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0043

PRIVATE FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

AFFIDAVIT OF ROBERT A. FALATINE

I, Robert A. Falatine, being duly sworn, do depose and say:

1. I am Robert A. Falatine, 380-62-9053, a Lance Corporal in the U.S. Marine Corps assigned to the First Marine Aircraft Wing at Marine Corps Air Station, Iwakuni, Japan.

2. I have read and hereby verify the complaint in the above-captioned action in which I am a plaintiff and attest to its contents.

3. On or about May 8, 1974, pursuant to 1st Marine Aircraft Wing Order 5370.1A/Marine Corps Air Station Order 5370.3A, I submitted a letter to the Commanding General, 1st Marine Aircraft Wing, requesting permission to distribute for signatures a copy of a petition to Congressperson Ronald Dellums in support of universal and unconditional amnesty for Vietnam war resisters. (A copy of the petition was submitted to the Court as Exhibit B to the Complaint.) I asked permission to distribute the petition from May 15 to May 31 outside a post exchange and an enlisted men's club. In the alternative, I asked permission to circulate the petition on the street outside the main gate of the Air Station. I stated that the circulation of the petition would be accomplished while out of uniform and off-duty, would involve the use of no government materials, would not interfere with traffic or the performance of any military duties and would not result in any involvement in Japanese political

affairs. A copy of said letter is attached as Exhibit 1 to this affidavit.

4. On May 20, 1974, Gen. V. A. Armstrong, Commanding General, 1st Marine Aircraft Wing, denied my requests to circulate the petition. In his response, Gen. Armstrong said that the petition contained "gross misstatements and implications of law and fact" and that to allow its distribution "would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper discipline to the men under my command." A copy of said letter is attached as Exhibit 2 to this affidavit.

5. On May 23, 1974, I submitted a request for redress of wrongs under Article 138 of the Uniform Code of Military Justice to Gen. Armstrong, requesting that WgO 5370.1A/MCASO 5370.3A be rescinded because they violated the First Amendment to the U.S. Constitution and Department of Defense Directive 1325.6. I requested a reply within seven working days. A copy of said letter is attached as Exhibit 3 to this affidavit.

6. On or about June 8, 1974, having received no response to my May 23 letter to Gen. Armstrong, I prepared and filed a complaint directed in accordance with the provisions of Article 138 to the "Officer Exercising General Court-Martial Jurisdiction over Major General V. A. Armstrong, Commanding General, First Marine Aircraft Wing." This letter also requested that WgO 5370.1A/MCASO 5370.3A be rescinded. A copy of said letter is attached as Exhibit 4 to this affidavit.

7. On June 12, 1974, I received a response (dated June 8) from Gen. Armstrong, denying my May 23 request for revocation of WgO 5370.1A/MCASO 5370.3A. A copy of said letter is attached as Exhibit 5 to this affidavit.

8. On June 18, 1974, I received a response from Commander, Marine Corps Bases, Pacific to my Article 138 complaint on June 8. The complaint was returned without action because it was "not forwarded in accordance with the provisions of [Article 138]" in spite of the fact that Article 138 states that a complaint may be

made to *any* superior commissioned officer who shall forward the complaint to the officer exercising General Court Martial jurisdiction over the officer against whom the complaint is made. A copy of said "response" is attached as Exhibit 6 to this affidavit.

9. On June 24, 1974, pursuant to WgO 5370.1A/ MCASO 5370.3A, I requested permission to distribute copies of a leaflet containing the Declaration of Independence and the First Amendment to the U.S. Constitution in front of the Mini Mart and the Main Side Enlisted Men's Club on base during off-duty hours on the dates July 4 to July 7 and July 25 to July 30. On the same date, my co-plaintiff, Frank L. Huff requested permission to distribute the same leaflet off base. A copy of my letter request is attached as Exhibit 7 to this affidavit. (A copy of the leaflet has already been submitted to the Court as Exhibit C to the complaint.)

10. On July 1, 1974, Gen. Armstrong denied my request, stating that part of the leaflet was "disrespectful and contemptuous" of superior officers and that distribution of the leaflet presented "a clear hazard to the discipline and morale within the 1st Marine Aircraft Wing." A copy of said letter is attached as Exhibit 8 to the affidavit. On the same date, Pvt. Huff's request to distribute the same leaflet off base was approved by Gen. Armstrong.

11. On or about July 12, 1974, I and several other Marines while off-duty and out of uniform outside the main gate to the air station showed to our fellow Marines a copy of a letter to Senator J. William Fulbright concerning United States support for the government of South Korea. (A copy of the letter has been submitted to the Court as Exhibit D to the complaint.) So as not to violate WgO 5370.1A/MCASO 5370.3A, I did not distribute copies of the letter or ask for signatures, I merely showed it to those interested. Nevertheless, I was arrested by military police and charged with violating those regulations. The charges against me were subsequently dismissed.

12. On September 26, 1974, I forwarded a complaint pursuant to Article 138 of the UCMJ to the Commandant of the Marine Corps. requesting that WgO 5370.1A be rescinded. A copy of the letter is attached as Exhibit 9 to this affidavit.

13. On September 27, 1974, the Commandant of the Marine Corps by Gen. John R. DeBarr, Director of the Judge Advocate Division of the Marine Corps, responded to an inquiry conducted by Senator Philip A. Hart on my behalf regarding the legality of WgO 5370.1A. The Commandant's response stated that the regulation was supported by a commanding officer's authority to protect the loyalty, discipline and morale of his command and additionally, by the treaty agreement between the United States and Japan which prohibits members of the U.S. armed forces from engaging any political activity in Japan. A copy of the Telex letter is attached as Exhibit 10 to this affidavit.

14. My attempts to comply with WgO 5370.1A/ MCASO 5370.3A have been met with refusals to allow me to distribute leaflets and petitions to Congress, activities which should be guaranteed by the First Amendment, and, on one occasion, by my arrest. In any event, I should not be required to undergo a cumbersome, time-consuming censorship process to exercise my Constitutional right to petition my government and to distribute newspapers and other information of interest to my fellow Marines.

15. I do not understand what standards, if any, govern the review process of materials which I and other Marines seek to distribute. If there are any standards, they have been applied arbitrarily and inconsistently by the Commanding General, 1st Marine Aircraft Wing. For example, when I sought to distribute on-base copies of a leaflet containing the Declaration of Independence and the First Amendment, my request was denied on the basis of the leaflet's contents. Yet on the same day, a request by another Marine to distribute the same leaflet off-base was approved. (See para. 10 above.)

16. I do not understand how far the aforementioned regulations extend. They appear to prohibit the distribution of petitions to Congress, newspaper articles,

magazines, religious literature, personal letters and virtually anything else that can be contained on a printed page. The regulations also state that Marines cannot "originate" such material which could preclude the writing of letters to the editor of a newspaper or an individual petition to a Congressional representative. I do not think anyone has any idea of when to enforce these regulation or to what situations they are supposed to apply. I was arrested merely for *holding* and *showing* to other Marines a copy of a letter to a U.S. Senator while I was off-base and off-duty.

17. I desire to initiate and distribute petitions, newspapers and other information of topical importance to members of the Marine Corps. I believe that I have an absolute right to circulate petitions to the Congress of the United States while on base, as long as I do it in a reasonable time, place and manner without interfering with any military duties or operations. I also think I have a right to distribute any literature off base as long as I do not involve myself with Japanese politics or the conduct of the Japanese government. I wish to distribute material off base only to American servicepersons and their families in the proximity of the base and only on subjects which pertain to American government, for example, information on the Declaration of Independence and on amnesty for American war resisters.

18. I fear that I will be subject to arrest and other forms of intimidation if I continue to try to exercise my Constitutional rights. I also believe that the Marine Corps has in its files information on my arrest of July 12 which may jeopardize my future employment and other opportunities which might otherwise be available to me.

19. I have already suffered substantial injury by my inability to exercise those right guaranteed to me as an American citizen. Since May, 1974, I have sought to use the administrative process to change the afore-mentioned regulations, all to no avail. In the meantime, my rights

continue to be curtailed so I am forced to seek relief in a civilian court.

/s/ Robert A. Falatine
ROBERT A. FALATINE

/s/ Hugh C. Brown
CAPT, USMCR

Authorized to administer oaths and act as Notary Public under Article 136(a), Uniform Code of Military Justice; Ttile 10 USC, Sec. 936; and Public Law 86-589 approved 5 Jul 60.

Sworn and subscribed to and before me on this 19th day of May, 1975.

EXHIBIT 1

Headquarters and Maintenance Squadron 17
Marine Wing Support Group 17
1st Marine Aircraft Wing
Fleet Marine Force Pacific
FPO, San Francisco 96602

8 May 1974

From: Lance Corporal Robert A. FALATINE, 380 62 9053/1341, USMC

To: Commanding General, 1st Marine Aircraft Wing
Commanding Officer, Marine Air Corps Station, FPO Seattle 98764

Via: (1) Commanding Officer, Headquarters and Maintenance Squadron 17
(2) Commanding Officer, Marine Wing Support Group 17

Ref: (a) WgO 5370.1A/MCASO 5370.3A

Subj: Request for prior approval to circulate a petition as required by WgO 5370.1A/MCASO 5370.3A.

Encl: (a) Petition to Congressperson Donald Dellums for Universal and Unconditional Amnesty

I, Robert A. FALATINE, 380 62 9053, in compliance with reference () hereby request permission to circulate and obtain signatures on enclosure (a) outside the Main Exchange, MCAS and/or outside the Main Side Enlisted Men's Club. If you cannot grant my request to circulate this petition on base, then I secondarily request permission to circulate this petition along the side of the street which runs from the main gate, MCAS, Iwakuni, Japan, to the area known as "Three Corners." This permission is requested for my off-duty days and hours during the period between May 15, 1974 and May 31, 1974 from 12:00 to 21:30 hours.

This circulation:

(a) will be during off-duty hours and out of uniform;

(b) will constitute no interference with the performance of my duties or the duties of other military personnel;

(c) will involve the use of no government material;

(d) will not result in the coercing of anyone to take or read or sign copies of enclosure (a)

(e) will be done in such a way as to avoid interference with pedestrian and vehicular traffic;

(f) will not involve the use of any stands;

(g) will not involve the posting of any literature announcing this circulation;

(h) will honor all military courtesy; and

(i) will not in any way result in my involvement in Japanese political affairs;

And I respectfully request that this letter be forwarded up the chain until it reaches the person who has the full authority to approve or deny this request and that I receive a written response to this request on or before May 14, 1974. I also request written assurance that those persons signing enclosure (a) will not be prosecuted.

ROBERT A. FALATINE

EXHIBIT 2

[SEAL]

COMMANDING GENERAL

1st Marine Aircraft Wing, FMF
FPO, San Francisco, 96602

IN REPLY REFER TO:

17:MPM:kps
1000
20 MAY 1974

From: Commanding General

To: Lance Corporal Robert A. FALANTINE, 380 62 9053/1341, U.S. Marine Corps

Via: (1) Commanding Officer, Marine Wing Support Group 17, 1st Marine Aircraft Wing

(2) Commanding Officer, Headquarters and Maintenance Squadron 17, Marine Wing Support Group 17, 1st Marine Aircraft Wing

Subj: Request for prior approval to circulate a petition

Ref: (a) Your letter of 10 May 1974

1. Reference (a), which requested permission to circulate a petition addressed to Congressperson Ronald Dellums, was forwarded to me through your chain of command. Careful consideration has been given to the request therein.

2. The petition that you desire to circulate contains gross misstatements and implications of law and fact. In addition, it impugns by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces in the exercise of his constitutional responsibility. To authorize permission to circulate such grossly erroneous and misleading commentary would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command. Accordingly, your request to circulate the petition as submitted is not approved.

/s/ V. A. Armstrong
V. A. ARMSTRONG

EXHIBIT 7

HEADQUARTERS AND MAINTENANCE SQUADRON 17

Marine Wing Support Group 17
1st Marine Aircraft Wing
Fleet Marine Force Pacific
FPO San Francisco, CA 96602

24 Jun 1974

From: Lance Corporal Robert A. Falatine, 380 62 9053/1341 USMC

To: Commanding General, 1st Marine Aircraft Wing

Via: Commanding Officer, Headquarters and Maintenance Squadron 17
Commanding Officer, Marine Wing Support Group 17

Subj: Request for prior approval to distribute copies of enclosure (1) as required by WgO 5370.1A/MCASO 5370.3A

Ref: (A) WgO 5370.1A
(B) MCASO 5370.3A

Encl: Leaflet containing the Declaration of Independence and the First Amendment to the U.S. Constitution

I, Robert A. FALATINE, IN COMPLIANCE WITH REFERENCES (A) and (B) request permission to distribute copies of enclosure (1) in front of the Mini Mart, Main Side and in front of the Main Side Enlisted Men's Club, MCAS, Iwakuni. This permission is requested for my off-duty hours and days during the period between 4 July 1974 thru 7 July and between 25 July 1974 thru 30 July 1974.

This distribution:

(a) Will be during off-duty hours and out of uniform.

(b) Will constitute no interference with the performance of my duties or the duties of any other military personnel.

(c) Will involve the use of no government material.

(d) Will not result in the coercing of anyone to take or read copies of enclosure (1).

(e) Will be done in such a way as to avoid interference with pedestrian and vehicular traffic.

(f) Will not involve the use of any stands.

(g) Will not involve the posting of any literature announcing this distribution.

(h) Will honor military courtesy, and will not in any way result in my involvement in Japanese political affairs.

I respectfully request that this letter be forwarded up my chain of command until it reaches the person who has the full authority to approve or deny this request and that I receive a written response to this request on or before 2 July 1974.

/s/ Robert A. Falatine
ROBERT A. FALATINE

EXHIBIT 8

[SEAL]

UNITED STATES MARINE CORPS
HEADQUARTERS

1st Marine Aircraft Wing, FMF
FPO, San Francisco, 96602

IN REPLY REFER TO:
17:WBD:gwb
5370
1 JUL 1974

From: Commanding General

To: Lance Corporal Robert A. FALATINE, 380 62 90 53/1341, U.S. Marine Corps

Via: (1) Commanding Officer, Marine Wing Support Group 17

(2) Commanding Officer, Headquarters and Maintenance Squadron 17

Subj: Request to Distribute Leaflet; "We Hold These Truths to be Self-Evident (But Do the Brass?)"

Ref: (a) LCpl Falatine's ltr of 24 June 1974

1. I have reviewed your request to distribute copies of the subject leaflet. The introductory paragraph is, by transparent implication, disrespectful and contemptuous of all of your superiors, officers, noncommissioned officers and civilians alike. As such, I consider that distribution of the flyer would present a clear hazard to the discipline and morale within the 1st Marine Aircraft Wing. Your request to distribute enclosure (1) to reference (a) is not approved.

/s/ V. A. Armstrong
V. A. ARMSTRONG

APPENDIX VI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0043

PRIVATE FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

AFFIDAVIT OF ROBERT E. GABRIELSON

I, Robert E. Gabrielson, being duly sworn, do depose and say:

1. I am a Sergeant in the U.S. Marine Corps, service no. 558-90-6571, assigned to the Marine Corps Air Station, Iwakuni, Japan.

2. I have read and hereby verify the complaint in the above-captioned action in which I am a plaintiff and attest to its contents.

3. On July 30, 1974, pursuant to Marine Corps Air Station Order 5370.1A/First Marine Aircraft Wing Order 5370.3A, I requested permission from the Commanding Officer, Marine Corps Air Station, Iwakuni, Japan, to distribute copies of a letter to Senator J. William Fulbright and copies of a statement on the arrest of five Marines (including my co-plaintiffs Frank L. Huff and Robert A. Falatine) for showing copies of the Fulbright letter to other Marines without prior command approval. (A copy of the letter and statement were submitted to the Court as Exhibits D and E to the complaint.) I requested permission to distribute the materials both off base near the main gate to the Air Station and on base in the "B" Barracks area. I said that the distribution would be accomplished while off duty and out of uniform, would not interfere with the performance of any military duties, would honor military courtesy and would

not result in my involvement in Japanese political affairs. A copy of said letter to the Comanding Officer, MCAS Iwakuni is attached as Exhibit 1 to this affidavit.

4. On August 6, 1974, I received a response from Col. E. S. Murphy, Commanding Officer, MCAS Iwakuni, partially granting my request. He allowed me to distribute the letter and statement on the sidewalks in the "B" Barracks area but not in the barracks themselves. He denied my request to distribute the materials outside the main gate because he said this constituted "a form of political activity within the host country" which was prohibited by the Status of Forces Agreement between the United States and Japan. A copy of said letter is attached as Exhibit 2 to this affidavit.

5. On August 13, 1974, I submitted a request for redress of wrongs under Article 138 of the Uniform Code of Military Justice to the Commanding Officer of MCAS Iwakuni, requesting that MCASO 5370.3A be rescinded as violative of the First Amendment to the U.S. Constitution. I also pointed out that the kind of material I sought to distribute off base in my request of July 30 was not considered by Japanese authorities to be "political activity" prohibited by the Status of Forces Agreement. A copy of my Article 138 complaint is attached as Exhibit 3 to this affidavit.

6. On September 3, 1974, Lt. Col. W. C. Service, III, Acting Commanding Officer, MCAS Iwakuni, denied my Article 138 request for redress of grievances. A copy of this response is attached as Exhibit 4 to this affidavit.

7. On September 10, 1974, I submitted a request for redress of wrongs under Article 138 to the Commanding General, 1st Marine Aircraft Wing, requesting that MCASO 5370.3A be rescinded. A copy of this Article 138 request is attached as Exhibit 5 to this complaint.

8. I continue to want to distribute petitions, newspapers and other written material without having to go through a censorship procedure which allows a commanding officer to pass judgment on the content of the materials I seek to distribute.

9. Especially where distribution of news material and petitions to government are concerned, time is of the essence. I have already suffered substantial injury by

waiting these many months for the Marine Corps to rescind its censorship system.

10. I fear arrest and other forms of intimidation as has been incurred by my co-plaintiffs if I assert my First Amendment rights. Following the procedures set forth in MCASO 5370.3A is intimidating in itself, for it requires me to offer my personal views for judgment by the commanding officer and marks me as a "dissident" in the eyes of the command.

11. MCASO 5370.3A/WgO 5370.1A are overbroad and indefinite in their terms. The regulations seem to prohibit any Marine from handing any written material to any other Marine without prior approval of the command.

12. I believe that the Commanding Officer, Marine Corps Air Station Iwakuni has misconstrued the Status of Forces Agreement between the United States and Japan. I have never sought nor do I desire to seek to distribute any material which is directed toward Japanese politics or government. Yet my Commanding Officer in his letter of August 6 (see Exhibit 2) seems to believe that political information of any sort—even if it pertains exclusively to the United States—is prohibited by the Status of Forces Agreement. It is my understanding that Japanese authorities have construed the Status of Forces Agreement as prohibiting only direct involvement by American military personnel in Japanese political activities.

/s/ Robert E. Gabrielson
ROBERT E. GABRIELSON

Sworn and subscribed to and before me on this 21st day of May, 1975, U.S. Marine Corps Air Station, Iwakuni, Japan.

/s/ Douglas C. Brown
DOUGLAS C. BROWN
Capt USMCR
Judge Advocate

Authorized to administer oath and act as Notary Public under Article 136(a), Uniform Code of Military Justice; Title 10 USC, Sec. 936; and Public Law 86-589 approved 5 Jul 60.

EXHIBIT 1

30 July, 1974

From: SGT Robert E. Gabrielson 558 90 6571

To: Commanding Officer, MCAS Iwakuni

Via: Officer in Charge, Air Traffic Control
Operations Officer, MCAS Iwakuni
Commanding Officer, H+HS, MCAS Iwakuni

Subj: Request for prior approval to distribute copies of enclosure (1) as required by WgO 5370.1A/ MCASO 5370.3A

Ref: (A) WgO 5370.1A
(B) MCASO 5370.3A

Encl: (1) Leaflet and individual letter to Sen. Fulbright

I, Robert E. Gabrielson, in compliance with references (A) and (B) request permission to distribute copies of enclosure (1) along the side of the street that runs from the main gate of MCAS, Iwakuni, Japan to the area known as "Three Corners" and (to be considered separately) in the "B" Barracks area of Main Side, MCAS, Iwakuni, Japan. This permission is requested for my off duty hours during the month of August, 1974.
This distribution:

(a) Will be during off-duty hours and out of uniform.

(b) Will constitute no interference with the performance of my duties or the duties of any other military personnel.

(c) Will involve the use of no government material.

(d) Will not result in the coercing of anyone to take or read copies of the enclosure (1).

(e) Will be done in such a way as to avoid interference with pedestrian and vehicular traffic.

(f) Will not involve the use of any stands.

(g) Will not involve the posting of any literature announcing this distribution.

(h) Will honor military courtesy, and will not in any way result in my involvement in Japanese political affairs.

I respectfully request that this letter be forwarded up my chain of command until it reaches the person who has the full authority to approve or deny this request on or before August 2, 1974. Unnecessary delay or alteration in the dates requested so as to effectively prohibit distribution during the period requested will be considered by me to be undue harassment and illegitimate restriction of my First Amendment rights.

/s/ Robert E. Gabrielson
ROBERT E. GABRIELSON

EXHIBIT 2

U.S. MARINE CORPS AIR STATION
FPO Seattle 98764

SJA/KTT/rlp
5500
6 AUG 1974

From: Commanding Officer

To: Sergeant Robert E. GABRIELSON, 558 90 6571, U.S. Marine Corps

Via: (1) Commanding Officer, Headquarters and Headquarters Squadron, U.S. Marine Corps Air Station, FPO Seattle 98764

(2) Operations Officer, U.S. Marine Corps Air Station, FPO Seattle 98764

(3) Air Traffic Control Officer, U.S. Marine Corps Air Station, FPO Seattle 98764

Subj: Request for prior approval to distribute copies of enclosures (1) and (2) of the basic correspondence

Ref: (a) Sgt GABRIELSON's ltr dtd 30 July 1974

(b) Status of Forces Agreement

1. I have carefully reviewed your request to distribute the leaflets contained as enclosures in reference (a).
2. Your request to distribute these enclosures in the Kawashima area is considered to be a form of political activity within the host country and would be in violation of reference (b). Therefore, your request to distribute the enclosures of the basic correspondence along the street which runs from the Main Gate, MCAS, Iwakuni, to the area known as "Three Corners" is denied.
3. In your letter you have asked that I consider separately a request to distribute the enclosures of your letter in the "B" barracks area of MCAS, Iwakuni. This is interpreted to mean along the sidewalks adjacent to and at the entrances of building #278. This portion

of your request is approved, however, you are reminded that you are not to attempt to distribute the materials in the barracks.
4. This permission extends to you alone and only for the materials which you have requested to distribute. Additionally, you are to insure that distribution will be in such a way as to constitute no interference with the performance of any of your duties or the duties of any other personnel, that no government material will be used, that you will in no way coerce any person to accept or read your material, that you will not engage in argument or debate of the issue presented in your material, that you will avoid interference with traffic, either vehicular or pedestrian, that you will not use stands or post literature announcing your distribution, and that you will not be in uniform during your distribution.
5. You are also reminded that it will be your responsibility to police up any of your materials which may be discarded within the area in which you are distributing.
6. This permission covers the period for which you have requested but is not to be construed as authorization to avoid any of your military duties and you are reminded that such permission is based on strict compliance on your part with the provisions of this letter of permission.

E. S. MURPHY

SUPREME COURT OF THE UNITED STATES

No. 78-599

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

FRANK L. HUFF, ET AL.

ORDER ALLOWING CERTIORARI. Filed March 19, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is set for oral argument in tandem with No. 78-1006, *Brown* v. *Glines*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 293518 394

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-599

SECRETARY OF THE NAVY, et al.,

Petitioners,

v.

PRIVATE FRANK L. HUFF, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondents, by their counsel, move, pursuant to Rule 53, for leave to proceed in this Court in forma pauperis.

In support of this motion there is attached hereto the affidavit of the respondent Frank L. Huff.

Alan Dranitzke
Counsel for Respondents

In The

SUPREME COURT OF THE UNITED STATES

No. 78-599

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PRIVATE FRANK L. HUFF, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

County of LOS ANGELES,

State of CALIFORNIA, SS:

FRANK L. HUFF, being first duly sworn, deposes and says:

1. I am a respondent in the above-captioned proceeding.

2. The nature of the action is as follows. The Solicitor General, on behalf of the Secretary of the Navy and several military officers, seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit which upheld the statutory right under 10 U.S. Code §1034 of military personnel at the United States Marine Corps Air Station, Iwakuni, Japan, to circulate on base petitions to members of Congress without prior command approval.

3. I am unable to pay the costs of the proceeding or to give security therefor.

4. I believe that I am entitled to redress.

Frank L. Huff
Frank L. Huff

Subscribed and sworn to before me this 8th day of December, 1978.

Irene Mc Culloch
Notary Public
My Commission Expires: Feb 22 1980

OFFICIAL SEAL
Irene Mc Culloch
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires FEB 22, 1980

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-599

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

Alan Dranitzke
David Rein
Rein, Drew, Garfinkle & Dranitzke
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Washington College of Law
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Washington, D. C. 20016

Attorneys for Respondents

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-599

SECRETARY OF THE NAVY, et al.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

The respondents individually and as a class, by their attorneys, respectfully request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit, in Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978) (App. A, 1a-32a), held that certain Navy and Marine Corps regulations, which prohibit any circulation of any petitions to members of Congress by military personnel on the Marine Corps Air Station, Iwakuni, Japan, without prior command approval, violate 10 U. S. Code §1034. The Solicitor General, in his Petition for a Writ of Certiorari (Pet. 9-20) and his Supplemental Memorandum (Supp. 1-2), essentially makes the following three arguments as to why a writ

of certiorari should issue in this case: (1) an important issue of law is presented as it relates to our nation's security; (2) the decision of the Court of Appeals conflicts with Greer v. Spock, 424 U.S. 828 (1976); (3) the Court of Appeals' opinion represents an erroneous interpretation of 10 U. S. Code §1034. As will be discussed below, none of these contentions are supportable and, accordingly, there is no reason to grant the petition of the Solicitor General.

1. The Solicitor General argues that the military services believe some form of prior restraint over on-base petitioning activities of service personnel is essential and, therefore, the regulations under review are necessary to the security of our nation; it is argued that the decision of the Court of Appeals, striking down that prior restraint system as applied to petitions to Congress, interferes with the role of the military. The government contends that this is a significant question of law and that the decision below has world-wide effect. (Pet. 9-10, 14-18; Supp. 2.)

The Solicitor General's argument is pure hyperbole. Never, at any stage in the proceedings, has the government requested a stay of the injunction originally issued by the District Court on May 27, 1976 (App. F, 55a-57a). That injunction, despite its supposed world-wide adverse effects, has been in existence for two and a half years now and the government has never requested a stay either from the District Court or from the Circuit Court or from this Court.[1/] The only procedural requests the government has filed in this Court and below have been motions, numerous ones, for extensions of time.

1/ The original injunction issued by the District Court was actually broader than the decision of the Court of Appeals, since it included within its scope the distribution of materials as well.

No presentation has been made at any stage by the government that respondents' activities or the court's injunction actually interfered with the proper functioning of the military. This clearly demonstrates that there is no merit to the government's contentions.[2/]

The decision below simply permits military personnel to originate, circulate, and sign petitions to members of Congress on a military base at Iwakuni, Japan, without first submitting them to their commanders for prior approval. Such a decision does not, as shown by the actions of the government, realistically relate to our national security.

2. Contrary to the contentions of the government (Pet. 11-18), the decision below does not present a direct and irreconcilable conflict with this Court's decision in Greer v. Spock. That case involved the authority of the military to prohibit and/or restrain civilians from bringing on to a basic training base partisan political campaign speeches and literature. Here, respondents are members of the military itself seeking to circulate petitions among other members of the military on their own base, which is not a basic training camp, pursuant to their rights under 10 U. S. Code §1034. As stated by the court below:

> "We find Greer neither controlling nor persuasive with respect to the issue of the validity of the regulations implementing a system of prior restraint on petitions at the Iwakuni Air Station. Most significantly, of course, the holding in Greer was constitutionally based. The Greer Court had no occasion to consider the validity of that prior restraint regulation under §1034 because petitions to Congress were not involved in Greer." Huff v. Secretary of the Navy, supra, 575 F.2d at 915 (App. A, 18a). 3/

2/ The conclusory allegations found in the affidavit of a Marine general (App. G, 58a-63a) did not impress the District Court or the Court of Appeals. The fact that at no stage has the government requested a stay of the injunction belies the allegations of the affidavit.

3/ The respondents do not in any way concede that the voided regulations are constitutionally permissible. See Huff v. Secretary of the Navy, supra, 575 F.2d at 911, 915 (App. A, 7a-10a, 20a).

Recently, two appellate decisions from the Ninth Circuit, Allen v. Monger, 583 F.2d 438 (9th Cir. 1978) (Supp. App., 1a-12a), and Glines v. Wade, No. 76-1412 (9th Cir. Oct. 5, 1978) (Supp. App., 13a-27a), likewise found no conflict between Greer v. Spock and their holdings that the military's prior restraint systems were invalid. In Allen v. Monger, supra, 583 F.2d at 442 (Supp. App., 12a), the Ninth Circuit stated:

> "Greer v. Spock, . . . , which the government emphasizes, does not apply to this case. Greer rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit."

In fact, contrary to the Solicitor General's contentions, there is no conflict between the decision below and this Court's opinion in Greer v. Spock.

3. The court below simply applied the statute, 10 U. S. Code §1034, in invalidating the regulations restricting service members' rights to communicate with members of Congress. The government contends (Pet. 19-20) that the court's interpretation of the statute's language and history is in error.

First, as found by the court below, Huff v. Secretary of the Navy, supra, 575 F.2d at 912-13 (App. A, 11a-13a), there is nothing in the actual language of the statute which restricts its protections to an individual military member's right to send a grievance to a member of Congress.[4/] This can be the only proper view of the statute, given the "long and cherished tradition in this country," as guaranteed by the First Amendment, to petition the government for redress of grievances. Second, the legislative history of 10 U. S. Code §1034 relied upon by the government is incomplete, and thus,

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4/ Although the government contends (Pet. 14, 19) that nothing in the regulations restrains individual communications with Congress, the government also recognizes (Pet. 19 n. 14) that an individual's communication can be a "petition." The regulations require prior approval for the origiination, signing, and distribution of any petition (Pet. 3). Accordingly, even under the government's argument, there is a direct conflict between the regulations and the statute.

distorted. The more extensive legislative history set forth in Allen v. Monger, 583 F.2d at 440-42 (Supp. App., 6a-10a), demonstrates that the original purposes of the statute were much broader than the government's contentions. Furthermore, the Department of Defense Directive No. 1325.6 supports the respondents' position that the statute encompasses the right to petition. See Huff v. Secretary of the Navy, supra, 575 F.2d at 912-13 (App. A, 12a).

In addition, the correctness of the Court of Appeals' interpretation of 10 U. S. Code §1034 is shown by the facts in this case. See Huff v. Secretary of the Navy, supra, 575 F.2d at 909 n. 2 (App. A, 3a n. 2). The military used prior restraint regulations to prohibit proper petitions. Statements by the commanding officers denying approval of requests to circulate petitions and other materials amply demonstrate that their decisions were the result of, at best, disagreement with the substance of the petitions or the result of whim and caprice. In fact, the actions of the military officials were so insupportable that the government found itself forced to concede error both in the District Court and in the Court of Appeals. A review of the facts leads one to believe that the entire purpose of the regulations is to inhibit the circulation of petitions by requiring prior approval.

The government contends (Pet. 14): "The regulations at issue in this case strictly limit the grounds on which commanders can disapprove circulation of petitions. It therefore can be expected that most petitions will be approved for circulation." But, as demonstrated by the facts in this case, the requests to circulate petitions were denied for reasons outside the language of the regulations. The one time the language of the regulations was employed, the commanding officer disapproved one respondent's request as "a clear hazard to discipline and morale;" yet, on that very same date, that same commanding officer approved distribution of that very same leaflet by another respondent. Thus, it is perfectly plain, as both Courts of Appeals have

held, that the rights of military members to petition Congress cannot be effectively exercised under regulations requiring prior command approval.

It is clear that the decision below was correct, both with regard to the language of the statute and its legislative history. However, if the military services do not care for the result of the Court of Appeals' decision, their proper avenue for relief is the Congress of the United States and not this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Alan Dranitzke
David Rein
David Addlestone

Attorneys for Respondents

December 1978

No. 78-599

In the Supreme Court of the United States

OCTOBER TERM, 1978

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 575 F.2d 907. The opinion of the district court (Pet. App. 33a-50a) is reported at 413 F. Supp. 863.

JURISDICTION

The judgment of the court of appeals (Pet. App. 51a-52a) was entered on March 15, 1978. A petition for rehearing was denied on May 15, 1978 (Pet. App. 53a). On August 7, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 12, 1978. On September 1, 1978, Mr. Justice Brennan further extended the time to October 12, 1978. The petition was filed on October

10, 1978, and was granted on March 19, 1979 (A. 58). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Navy and Marine Corps regulations that require military personnel located at a foreign duty station to obtain approval before circulating petitions to members of Congress on military bases are invalid under 10 U.S.C. 1034.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Department of Defense Directive 1325.6 (1969) provides in relevant part:

I. *PURPOSE AND APPLICABILITY*

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

II. *POLICY*

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

III. *SPECIFIC GUIDELINES*

The following Guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post

exchange and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale or military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

4. Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) provides in relevant part:[1]

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[1]Four Navy and Marine Corps regulations are at issue in this case. Each regulation has the same operative language as the one quoted in the text; they differ only on the geographic area where they apply. See Pet. App. 7a. The challenged regulations are

a. Section 3(b)

No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.

b. Section 4(a):

Commanding generals and commanding officers will control or prohibit the unauthorized activities described in subparagraphs 3a, 3b, and 3c above if, in their judgment, the activity would:

(1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or

(2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or

(3) Involve distribution of material or the rendering of advice or counsel that causes,

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paralleled by regulations adopted by the Army and Air Force. See *Schneider* v. *Laird*, 453 F. 2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972). The Air Force regulations are the subject of *Brown* v. *Glines*, No. 78-1006, which is to be argued in tandem with this case.

attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discioses classified information, or contains obscene or pornographic matter; or

(4) Involve the planning or perpetration of an unlawful act or acts.

c. Section 4(c):

Instances in which a commander has prohibited activities or actions of Fleet Marine Force, Pacific or Marine Corps Base, Pacific, personnel pursuant to subparagraphs 3a, 3b, and 3c above shall be immediately reported, with amplifying details, by message to his headquarters.

STATEMENT

1. Each of the military departments has adopted regulations that require servicemen who wish to distribute petitions or other written materials on a military base to obtain the prior approval of their commanding officer. See, *e.g.*, FMFO 5370.3 (Navy); AFR 30-1(9) (Air Force).[2] These regulations are authorized by Department of Defense (DOD) Directive 1325.6 (1969). The Directive provides that "a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military

[2]The Army regulations are discussed in *Schneider* v. *Laird*, *supra*. See also *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F. 2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission." DOD Dir. 1325.6 para. III(A)(1). The policy of the Directive is to preserve the service member's right of expression * * * to the maximum extent possible, consistent with good order and discipline and the national security." *Id.* at para. II. Thus, the Directive counsels that the "fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited." *Id.* at para. III(A)(3).

Pursuant to this Directive, Navy and Marine Corps regulations provide that no servicemen shall "distribute or promulgate petitions, publications * * * handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or * * * on any military installation on duty or in uniform, * * * unless prior command approval is obtained." FMFO 5370.3 §3(b). The regulations further provide that the commanding officer is to deny approval if the material proposed for distribution would (1) materially interfere with the safety or duties of the command, (2) "[p]resent a clear danger to the loyalty, discipline, morale, or safety" of the personnel in his command, (3) cause or advocate insubordination, disloyalty, desertion, or contain obscene matter, or (4) involve the planning of an unlawful act. *Id.* at §4(a).

2. During 1974 respondents, three Marine Corps Servicemen stationed at the United States Marine Corps Air Station at Iwakuni, Japan, sought prior approval from their base commander to distribute copies of petitions to members of Congress. One

petition objected to the use of military personnel in labor disputes; a second supported amnesty for those who resisted conscription or deserted the armed forces during the Vietnam war (Pet. App. 39a). The base commander denied permission to circulate these two petitions on the base (Pet. App. 3a; A. 34-35, 46-47).[3] Respondents Huff and Falatine distributed, without seeking permission, copies of a third petition objecting to United States support for the government of South Korea (Pet. App. 40a). They were arrested, and Huff was convicted after a court-martial of violating the prior approval requirement (*ibid.*). After the arrests respondent Gabrielson sought permission to distribute the South Korea petition on and off the base; the base commander granted permission for on-base circulation, provided that the circulation was non-argumentative and did not take place in the barracks (*id.* at 40a-41a; A. 56-57).

3. Respondents then filed this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against further enforcement of the military regulations. They alleged that the regulations are an unconstitutional restraint on First Amendment expression and are invalid under 10 U.S.C. 1034, which prohibits any person from

[3]Following this denial, respondents Huff and Falatine requested permission to circulate copies of a leaflet containing the Declaration of Independence and the First Amendment to the Constitution, along with their interpretation of these documents (Pet. App. 39a). The base commander denied permission to circulate this leaflet (*id.* at 39a-40a). During the course of this litigation petitioners conceded that the base commander lacked proper basis under the regulations to refuse to allow distribution of these materials (*id.* at 3a).

"restrict[ing] any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States" (A. 5-13). Respondents sought, and obtained, certification of the case as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan * * *" (Order of July 17, 1975, at 4).

The district court granted respondents' motion for summary judgment. The court held that "the very system of prior restraints for serviceman-to-serviceman distribution of materials on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment freedoms" (Pet. App. 45a). The court also concluded that the base commander's decision to prohibit or restrict distribution of the three specific petitions to members of Congress was not grounded in a sufficient showing of military necessity and was therefore invalid under 10 U.S.C. 1034 (*id.* at 44a).[4] Accordingly, the court entered an injunction prohibiting the military officials from applying the challenged regulations to require prior approval for the "distribution of printed materials during off-hours and away from restricted or work areas on-base at the Marine Corps Air Station, Iwakuni, Japan" (*id.* at 57a).

[4]The district court upheld application of the prior approval requirement to off-base petitioning in foreign countries (Pet. App. 48a-50a). Accordingly, it did not disturb the sanctions imposed for the off-base distribution of the South Korea petition (*id.* at 50a).

4. The court of appeals held that the focal point of the litigation is on petitions to members of Congress and that the validity of the regulations with respect to other types of written materials could not properly be decided on the record in this case (*id.* at 5a-7a). The court therefore rejected the broad holding of the district court that the prior approval requirement of the regulations is invalid as applied to all written materials distributed on base (*id.* at 5a-7a, 21a).

The court of appeals found it unnecessary to decide whether the regulations' requirement that servicemen submit petitions to members of Congress to military authorities for approval prior to distribution is an unconstitutional "prior restraint" on expression.[5] The court concluded instead that application of the prior approval requirement to such petitions is invalid under 10 U.S.C. 1034, which prohibits regulatory restrictions that are not "necessary to the security of the United States." Although the court recognized that the prior approval requirement contributes to "order and discipline" at the "combat ready" Iwakuni Air Station,[6] the court concluded that avoiding "lapses of military discipline" is not "necessary to the national security"

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[5]The court noted, however, that under *Parker* v. *Levy*, 417 U.S. 733 (1974), "the presumption against prior restraints would not be as great [in the military context] as it is in the civilian context; and we would be required to undertake a careful balancing of competing first amendment interests and military requirements" (Pet. App. 9a).

[6]During 1972 and 1975 units were deployed directly from Iwakuni Air Station to combat and relief operations in Vietnam. Similar deployments to Thailand and Cambodia also occurred during these years (Pet. App. 28a-29a).

(Pet. App. 16a). Moreover, the court suggested that the military interest in preventing on-base distribution of "petitions which prove to be improper in their content" (*id.* at 17a) may be adequately protected by sanctions imposed after distribution has occurred. The court thus affirmed the injunction to the extent that it forbids application of the prior approval requirement to the distribution of servicemen's petitions to members of Congress.

Judge Tamm filed a separate opinion arguing that the judgment of the district court should be reversed in its entirety (*id.* at 22a-32a). Reviewing the legislative history of 10 U.S.C. 1034, Judge Tamm determined that the statute is intended to proscribe only interference with a serviceman's personal, private communication to members of Congress. Application of the prior approval requirement to the on-base distribution of petitions, however, affects only collective petitioning activity. Accordingly, Judge Tamm concluded, 10 U.S.C. 1034 does not apply to the regulations challenged in this case (Pet. App. 26a). Judge Tamm also argued that even if Congress intended 10 U.S.C. 1034 to apply to both individual and collective petitioning activity, the prior approval requirement is valid because the maintenance of order, discipline, loyalty, and morale at a combat-ready military facility is necessary to the security of the United States within the meaning of that statute (Pet. App. 26a-31a).

ARGUMENT

For the reasons stated at pages 36-48 of our brief in *Brown* v. *Glines*, No. 78-1006,[7] the court of appeals erred in concluding that the prior approval requirement of the challenged regulations is invalid under 10 U.S.C. 1034.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

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[7]We are sending respondents a copy of our brief in *Brown* v. *Glines*.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-599

SECRETARY OF THE NAVY, et al.,

Petitioners,

v.

FRANK L. HUFF, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether Navy and Marine Corps regulations that require military personnel located at a foreign duty station to obtain approval before circulating on the base petitions to members of Congress are invalid under 10 U.S. Code § 1034.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

10 U.S. Code §1034 provides:

> "No person may restrict any member of the armed forces in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

Department of Defense (DOD) Directive (1325.6) (1969) provides in relevant part:

> "I. PURPOSE AND APPLICABILITY
>
> This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.
>
> III. SPECIFIC GUIDELINES
>
> The following Guidelines relate to principal activities in this area which the Armed Forces have encountered:
>
> G. *Grievances.* The right of members to complain and request redress of grievances against actions of their commanders is protected under Article 138 of the Uniform Code of Military Justice. In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. 1034). An open door policy for complaints is a basic principle of good leadership, and Commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.

Enclosure 1

CONSTITUTIONAL AND STATUTORY PROVISIONS RELEVANT TO HANDLING OF DISSIDENT AND PROTEST ACTIVITIES IN THE ARMED FORCES

A. *Constitution*: The First Amendment, U.S. Constitution, provides as follows:

> 'Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

B. *Statutory Provisions:*

1. *Applicable to All Persons*
   a. 18 U.S.C. §1381 – Enticing desertion.
   b. 18 U.S.C. §2385 – Advocating overthrow of the Government.
   c. 18 U.S.C. §2387 – Counselling of insubordination, disloyalty, mutiny, or refusal of duty.
   d. 18 U.S.C. §2388 – Causing or attempting to cause insubordination.
   e. 50 U.S.C. App. §462 – Counselling evasion of the draft.

2. *Applicable to Members of the Armed Forces*

a. 10 U.S.C. §917 (Article 117, UCMJ) – Provoking speech or gestures.

b. 10 U.S.C. §882 (Article 82, UCMJ) – Soliciting desertion, mutiny, sedition, or misbehavior before the enemy.

c. 10 U.S.C. §904 (Article 104, UCMJ) – Communication or corresponding with the enemy.

d. 10 U.S.C. §901 (Article 101, UCMJ) – Betraying a countersign.

e. 10 U.S.C. §888 (Article 88, UCMJ) – Contemptuous words by commissioned officers against certain officials.

f. 10 U.S.C. §889 (Article 89, UCMJ) – Disrespect toward his superior commisioned officer.

g. 10 U.S.C. §891 (Article 91, UCMJ) – Disrespect toward a warrant officer or noncommissioned officer in the execution of his office.

h. 10 U.S.C. §892 (Article 92, UCMJ) – Failure to obey a lawful order or regulation.

i. 10 U.S.C. §934 (Article 134, UCMJ) – Uttering disloyal statement, criminal libel, communicating a threat, and soliciting another to commit an offense."

Department of Defense (DOD) Directive 1344.10 (1969) provides in relevant part:

"Enclosure 1

In accordance with the policies established in Sec. 4, a member on active duty may:

2.f. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces."

Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) provides in pertinent part:

"3.b. No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.

4.a. Commanding generals and commanding officers will control or prohibit the unauthorized activities described in subparagraphs 3a, 3b, and 3c above if, in their judgment, the activity would:

(1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or

(2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or

(3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits deser-

tion, discloses classified information, or contains obscene or pornographic matter; or

(4) Involve the planning or perpetration of an unlawful act or acts."

STATEMENT

On January 10, 1975, three individuals filed suit in the United States District Court for the District of Columbia challenging certain United States Marine Corps and United States Navy Regulations, which limited their rights to originate, sign, distribute, and promulgate petitions and other written materials. (A. 5-24.) The three individuals, Private Frank L. Huff, Lance Corporal Robert A. Falantine, and Sergeant Robert E. Gabrielson, are United States citizens and were then members of the United States Marine Corps stationed at the Marine Corps Air Station, Iwakuni, Japan. They sued to restrain the defendants from denying them their rights under the First Amendment to the Constitution and to declare 1st Marine Aircraft Wing Order (MAWO) 5370.1A, Marine Corps Air Station (Iwakuni, Japan) Order (MCASO) 5370.3A, Fleet Marine Force Pacific Order (FMFO) 5370.3, and Commander-in-Chief, Pacific Fleet Instruction (CINCPACFLTINST) 5440.3C unconstitutional on their face and as applied. On March 13, 1975, the complaint was amended so as to be brought on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station, Iwakuni, Japan.[1] (A. 25-26.)

[1] On July 17, 1975, the case was certified as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan" on the issue of the validity of the challenged rules and regulations. *Huff v. Secretary of the Navy*, 413 F. Supp. 863, 864-65 (D.D.C. 1976).

The action was brought against the Secretary of the Navy, Commandant of the Marine Corps, Commander-in-Chief U.S. Pacific Fleet, Commanding General Fleet Marine Force Pacific, Commanding General 1st Marine Aircraft Wing, and Commanding Officer U.S. Marine Corps Air Station, who were the superior officers responsible for prescribing the rules and regulations and administering the rules and regulations in question. (A. 5-11.)

The regulations under attack read in pertinent part as follows:

> "No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, other printed or written materials, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained." FMFO 5370.3 §3.b.[2]

The specific facts which gave rise to the filing of this case are as follows. On May 2, 1974, Huff, pursuant to regulation, requested permission of the Commanding General, 1st Marine Aircraft Wing, to distribute for signature in his barracks a petition to Senator Alan Cranston regarding the use of members of the military and National Guard in labor disputes. (A. 7, 15, 27, 32.) Huff also requested permission to distribute off-base, outside the main gate of the Air Station, copies of

[2] All four regulations contain virtually the same language; all four are applicable to the Iwakuni Air Station.

a leaflet on the use of Article 138 of the Uniform Code of Military Justice. Huff stated that the distribution and petitioning would be accomplished while out of uniform and off-duty, would involve the use of no government materials, would not interfere with pedestrians or vehicular traffic, and would not interfere with the performance of duties of any military personnel. Huff's request covered the period from May 10 through May 14.

Thereafter, on May 20, 1974, General V.A. Armstrong, Commanding General, 1st Marine Aircraft Wing, denied both of Huff's requests of May 2. (A. 7, 28, 34-35.) General Armstrong's denial of permission to circulate the petition to Senator Cranston, stated as follows:

> "The petition which you desire to circulate contains gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces in the exercise of his constitutional responsibilities. To authorize permission to circulate such grossly erroneous and misleading commentary would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command. Accordingly, your request to circulate the petition as submitted is not approved." (A. 34-35.)

General Armstrong denied permission to distribute the leaflet because he considered the copyright release submitted to be insufficient evidence to demonstrate that the leaflet had in fact been released by the copyright holder. (A. 35.)

On or about May 8, 1974, pursuant to regulation,

Falatine submitted a letter to the Commanding General, 1st Marine Aircraft Wing, requesting permission to distribute for signatures a petition to Congressperson Ronald Dellums in support of universal and unconditional amnesty for Vietnam war resisters. (A. 8, 16-17, 38, 44-45.) Falatine asked permission to distribute the petition from May 15 to May 31 outside the post exchange and the enlisted men's club. In the alternative, he asked permission to circulate the petition on the street outside the main gate of the Air Station. He stated that the circulation of the petition would be accomplished while out of uniform and off-duty, would involve the use of no government materials, would not interfere with traffic, would not interfere with the performance of any military duties, and would not result in any involvement in Japanese political affairs.

On May 20, 1974, General Armstrong, Commanding General, 1st Marine Aircraft Wing, denied Falatine's request to circulate the petition. (A. 8, 39, 46-47.) The reasons given for the denial are exactly the same as the reasons given on that very same date to Huff for the denial of his petitioning request of May 2 (A. 34-35); in fact, with minor exception, General Armstrong used the exact same language in denying both Falatine's and Huff's requests. (Compare A. 34-35 with A. 46-47.)

Subsequently, on June 24, 1974, pursuant to regulation, Huff and Falatine separately requested permission from the Commanding General, 1st Marine Aircraft Wing, to distribute copies of a leaflet, entitled "We Hold These Truths To Be Self-Evident (But Do The Brass?)," containing the Declaration of Independence and the First Amendment to the Constitution, along with commentary. (A. 8, 18-20 29, 40, 48-49.) Huff

sought to distribute the leaflet outside the main gate of the Iwakuni Air Station, while off-duty and out of uniform. Falatine's request provided for distribution in front of the "Mini-Mart" and the enlisted men's club, on-base during off-duty hours while out of uniform, from July 4 to July 7 and July 25 to July 30. The distribution, Falatine's request stated, would constitute no interference with the performance of military duties, would involve the use of no government materials, would not result in the coercing of anyone to take or read copies of the leaflet, would be done in such a way to avoid interference with pedestrian and vehicular traffic, would not involve the posting of any literature announcing the distribution, would honor military courtesy, and would not in any way result in involvement in Japanese political affairs.

On July 1, 1974, General Armstrong, acting under the regulation, denied Falatine's request to distribute the leaflet on base. (A. 8-9, 40 50.) He stated in pertinent part:

> "The introductory paragraph is, by transparent implication, disrespectful and contemptuous of all of your superiors, officers, noncommissioned officers and civilians alike. As such, I consider that distribution of the flyer would present a clear hazard to the discipline and morale within the 1st Marine Aircraft Wing." (A. 50)

Despite General Armstrong's denial of Falatine's request and the reasons given, on that very same date, General Armstrong, acting under the identical regulation, approved Huff's request to distribute the very same leaflet off-base from July 2 through July 6. (A. 8-9, 29, 36-37.) No distinction was made by General Armstrong

between distribution of the leaflet on-base and distribution off-base which would in any way explain the approval of Huff's request and the denial of Falatine's request to distribute the same leaflet.[3]

Thereafter, on or about July 12, 1974, Huff, Falatine, and several other Marines while off-base, off-duty, and out of uniform, showed to fellow Marines a copy of a proposed letter to Senator J. William Fulbright, concerning United States support for the government of South Korea. (A. 9, 21-22 29 40.) They did not distribute copies of the letter or ask for signatures on it, but merely showed it to those interested Marines. Huff and Falatine were arrested by military police and charged under Article 92 of the UCMJ with violating the regulation by not seeking prior command approval. (A. 9, 30, 40.) Subsequently, Huff was convicted of two counts of violating the challenged regulations; he was sentenced to 60 days confinement at hard labor, forfeiture of half-pay and reduction in rank from E-3 to E-1, the lowest enlisted grade. (A. 9, 30.) However, the formal court martial proceedings against Falatine were dismissed, due to lack of evidence. (A. 9, 40.)

Gabrielson, on July 30, 1974, requested permission, pursuant to regulation, from the Commanding Officer, Marine Corps Air Station, Iwakuni, Japan, to distribute copies of the previously mentioned Fulbright letter as well as copies of a statement on the arrest of the five Marines for showing copies of the Fulbright to other

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[3] In granting Huff permission to distribute the leaflet, General Armstrong emphasized that Huff was "to insure that the document that you distribute is *precisely* the document that you have requested permission to distribute." (A. 36.) [Emphasis in original.]

Marines without prior command approval. (A. 9, 21-24, 51, 54.) Gabrielson requested permission to distribute these materials during the month of August both off-base, near the main gate to the Air Station, and on-base, in the "B" barracks area. On August 6, 1974, Gabrielson received a response from Colonel E.S. Murphy, Commanding Officer of the Air Station, only partially granting his request. (A. 9, 52, 56-57.) Permission was given to distribute the Fulbright letter and the statement on the sidewalks adjacent to and at the entrances of the "B" barracks, but not in the barracks themselves. The Commanding Officer further restricted the distribution on-base by stating that "you will not engage in argument or debate of the issue presented in your material. . . . ." (A. 57) Permission was denied to distribute the materials outside the main gate, because such distribution constituted "a form of political activity within the host country and would be in violation of . . ." the Status of Forces Agreement between the United States and Japan. (A. 56.)

Respondents, herein, believing that their constitutional and statutory rights had been violated by the Navy and the Marines, brought suit in federal court after failing to find relief within the military. On May 21, 1976, the District Court issued an opinion granting in part and denying in part respondents' motion for summary judgment. *Huff v. Secretary of the Navy,* 413 F. Supp. 863 (D.D.C. 1976). Essentially, the Court found that the actions of the military in prohibiting or restricting the distribution of petitions and printed material on-base at Iwakuni violated the First Amendment to the Constitution and 10 U.S. Code §1034; the Court held that the regulations were unconstitutional as

applied to serviceman-to-serviceman distribution and/or petitioning on-base during off-hours and away from restricted or work areas and violated 10 U.S. Code §1034 as applied to petitioning. On May 27, 1976, an injunction was issued restraining the military from continuing to require prior approval for such protected activities.

Petitioners appealed that part of the judgment granting respondents relief. By decision of March 15, 1978, the Circuit Court affirmed the part of the judgment which found the military regulations in violation of 10 U.S. Code §1034 as applied to on-base petitioning activities. *Huff v. Secretary of the Navy,* 575 F.2d 907 (D.C. Cir. 1978). The government requested a rehearing, which was denied on May 15, 1978. Subsequently, on October 10, 1978, a petition for a writ of certiorari was filed with this Court; the petition was granted on March 19, 1978.

SUMMARY OF ARGUMENT

Navy and Marine regulations requiring prior command approval before any petition is originated, signed, distributed, or promulgated violate 10 U.S. Code §1034. That statute, as shown by its plain language and legislative history, guarantees to all members of the military the right to petition Congress, both individually and collectively, without prior restraint. This interpretation of the statute is strongly reinforced by the historical importance of the First Amendment right to petition the government for a redress of grievances. The facts in this case show that any other statutory inter-

pretation gives the military free reign to prohibit unquestionably legitimate petitioning activity.

The only relevant exception to 10 U.S. Code §1034 is "a regulation necessary to the security of the United States." As demonstrated clearly by the actions of the government, the system of prior restraint established by these regulations is not necessary to our nation's security. For over three years now an injunction has been in effect restraining the enforcement of these regulations as they pertain to petitioning activity; yet the government has not at any time requested any court for a stay of the injunction.

Greer v. Spock, 424 U.S. 828 (1976), does not require any different result since that case did not involve the right of service members to petition Congress under 10 U.S. Code §1034, but rather involved the question of the military's authority over civilians access to a basic training camp.

Accordingly, the military regulations are invalid under 10 U.S. Code §1034 to the extent that prior approval is required for petitioning activities between members of the military off-duty on-base away from restricted or work areas at a foreign duty station.

ARGUMENT

A. 10 U.S. Code §1034 Prohibits the Prior Restraint of Petitioning Activities.

Respondents, individually and as a class, were restricted in their petitioning activities by FMFO 5370.3, which states that Marine Corps personnel within the Pacific shall not:

> "*originate, sign, distribute, or promulgate petitions*, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or in any military installation on duty or in uniform, or anywhere *within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.*" [Emphasis added.]

Congress, however, has passed the following statute:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." 10 U.S. Code §1034.

As found by the Court below, *Huff v. Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), the Navy and Marine regulations under review are invalid under 10 U.S. Code §1034.

1. 10 U.S. Code §1034 applies to petitioning activities.

The statute, 10 U.S. Code §1034, prohibits any restriction in "communicating" with members of Congress unless "the communication" is unlawful or violates a regulation necessary to the country's security. Giving "communication" its ordinary meaning, *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Ernst & Ernst v. Hotchfelder*, 425 U.S. 185 (1976); *Columbia Water & Power Company v. Columbia Electric Street R.&P Company*, 172 U.S. 475 (1899), it is clear that petition-

ing is within the terms of the statute. For not only is petitioning, whether individually or collectively, an acceptable form of communication, but in the case of Congress, it is in fact a traditional form. The statute "does not by its terms distinguish among different kinds of communications." *Allen v. Monger*, 583 F.2d 438, 440 (9th Cir. 1978).[4]

The Department of Defense agrees that the statute encompasses petitioning. Section III G of Department of Defense Directive 1325.6, "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," reads in pertinent part as follows: "In addition, a member may *petition* or present any grievance to any member of Congress (10 U.S.C. 1034)." [Emphasis added.] Accordingly, there can be no question but that the statute protects petitioning activity.[5]

Although the government contends (Br. 37) that the statute is restricted to individuals, the language of the statute does not support this argument. The statute does not by its terms refer specifically to an individual member nor does it restrict "any member" from "communicating" only on an individual basis. As shown above, petitioning, as either an individual or collective activity, is certainly encompassed within the language of the statute. Further, there are no words in the statute which demonstrably restrict the meaning of the statute to individual action. Therefore, the government's contention that the statutory language restricts the protections of 10 U.S. Code §1034 to individuals acting alone cannot stand:

> "This Court pointed out in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, that '"the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."'" *Chandler v. Roudebush, supra*, 425 U.S. at 848.

The legislative history of 10 U.S. Code §1034 admittedly shows that the impetus for the statute was the problem encountered by a sailor desiring to communicate with his Congressman, Mr. Byrnes of Wisconsin. 97 Cong. Rec. 3776 (1951). The sailor had been advised by his commanding officer that a direct communication with his congressman was prohibited; Navy policy required that the communication be sent through official channels. Mr. Byrnes stated: "I will admit, Mr. Chairman, that there is no restriction on their right to send communications through channels, that anybody knows that that certainly is a restriction in and of itself." 97 Cong. Rec. 3776 (1951).

The amendment initially offered by Mr. Byrnes read as follows:

"No person shall be inducted for training and

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[4] A petition for a writ of certiorari is pending in this case *sub. nom. Brown v. Allen*, No. 78-1005, October Term, 1978.

[5] Despite the government's contention (Br. 37) that nothing in the regulations restrains individual communications with Congress, the government also recognizes (Br. 40-41 n. 21) that an individual's communication can be a "petition." The regulations require prior approval for the origination, signing, and distribution of any petition. Therefore, contrary to the government's argument, there is a direct conflict between the regulations and the statute. See also, *Huff v. Secretary of the Navy*, 575 F.2d at 917, n. 1 (Tamm, dissenting).

service under this title into any branch of the Armed Forces which restricts or limits the rights of its members to communicate directly with Members of Congress unless such communication is in violation of regulations necessary to the security and safety of the Armed Forces."

Subsequently, the proposed legislation was redrafted and offered in what became its final form. As adopted in 1951, it read as follows:

"No member of the Armed Forces shall be restricted or prevented from communicating directly or indirectly with any Member or Members of Congress concerning any subject unless such communication is in violation of law or in violation of regulations necessary to the security and safety of the United States."

The legislative history shows that it was the general intent of the Byrnes amendment to simplify communications with Congress and to eliminate military review of those communications. As stated by the Circuit Court below:

"The legislative history of §1034 confirms that Congress sought by this legislation to prohibit military commanders from interfering with communications to Members of Congress *in advance* of the actual sending of the communications. A system of prior restraint—as opposed, for instance, to the *post hoc* imposition of penalties for scurrilous, obscene, mendacious, or other improper communications—is precisely what Congress intended to prohibit, subject to the limited exceptions noted in the statute." *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912. [Footnote omitted.]

Contrary to the implications of the government's

argument (Br. 37, 40), there is no restriction in the wording of the statute on collective petitioning activities. Nor, in any way, does the legislative history support a restriction on group petitioning activities. As found by the Court below *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912:

"The Government contends, however, that the statute quoted above was intended to protect only letters by individuals to Members of Congress. We think the legislative history indeed leaves no doubt that the right to present a solitary, individual grievance to a Member of Congress is encompassed by §1034. *But there is no indication that this is the outer limit of the communication which Congress sought to protect in passing this legislation.*" [Footnotes omitted. Emphasis added.]

In reaching this conclusion, the Circuit Court quite correctly pointed out that a service member's solitary communication in many instances cannot as effectively accomplish what group petitioning activities or coordinated mailing campaigns could accomplish.

The Court of Appeals in *Allen v. Monger, supra*, 583 F.2d at 440-442, reached the same conclusion as the Court below regarding the scope of §1034. Relying upon the historical context, the Ninth Circuit found that the changes in the wording of the Byrnes amendment signified a broadening of Congressional purpose. As revised, and adopted, the Byrnes amendment prohibited restrictions on communicating "directly or indirectly" with any member or members of Congress concerning "any subject." These revisions, the Ninth Circuit found, enlarged the scope of the rights pro-

tected under the statute.[6]

Moreover, 10 U.S. Code §1034 must be interpreted, as pointed out by the Court below *Huff v. Secretary of the Navy, supra*, 575 F.2d at 913, in light of "the long and cherished tradition in this country, embodied in the first amendment ('. . . the right *of the people peaceably to assemble, and to petition Congress* for a redress of grievances'). . . ."[7] It is this "long and cherished tradition" which is completely disregarded by the government in its argument.

This Court on numerous occasions has recognized the First Amendment right to petition. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *Bridges v. California*, 314 U.S. 252 (1941). As stated in *Eastern Railroad Conference v. Noerr Motor Freight, supra*, 365 U.S. at 137-138:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress the intent to invade these freedoms."

[6] 10 U.S. Code §1034 was rewritten in 1956 as part of a recodification effort. Certain words were removed in that process as surplusage. It is clear from the congressional history that there was no intention to change the meaning of the statute. *Allen v. Monger, supra*, 583 F.2d at 441.

[7] See Brief for the Respondent at 8-15, *Brown v. Glines*, No. 78-1006, October Term, 1978.

In the same light, the decisions of this Court have long looked with strong disfavor upon any system of prior restraint. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Healey v. James*, 408 U.S. 169 (1972); *New York Times v. United States*, 403 U.S. 713 (1971); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Near v. Minnesota*, 283 U.S. 697 (1931). These decisions, as well, point towards an interpretation of 10 U.S. Code §1034 which does not limit its protection against prior restraint to the solitary individual letter, for a statute should be construed so as to avoid constitutional questions. *Eastern Railroad Conference v. Noerr Motor Freight, supra*, 365 U.S. at 138.

Further, the Department of Defense in two separate regulations recognizes the historical right to petition members of Congress. Section III G of DOD Directive 1325.6 reads in pertinent part as follows: "In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. §1034)." The DOD Directive 1344.10 states in Enclosure 1, paragraph 2.f., that a member on active duty may sign "a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces." In neither of these directives is any prior restraint imposed upon the right to petition.

From the wording of 10 U.S. Code §1034, its legislative history, and the importance of First Amendment values in our nation, it is clear that both individual and collective petitioning activity constitute communications to Congress protected by statute from prior restraint.

The application of the Navy and Marine regulations in the instant case clearly demonstrates the need for the protections of 10 U.S. Code §1034. The regulations require prior approval for originating, signing, distributing, and promulgating petitions. "Indeed, the requirement of command authorization is interposed at every stage of the petitioning process, from drafting the document to circulating it to signing it." *Huff v. Secretary of the Navy, supra*, 575 F.2d at 911. [Footnote omitted.] Because the individual respondents, as well as the class, are stationed at the Iwakuni Marine Corps Air Station, Japan, under the regulations it makes no difference whether the members are on-base or off-base, in uniform or out of uniform, on duty or off duty, or whether they solicit signatures from service persons or others; the regulation requires prior approval "anywhere within a foreign country irrespective of uniform or duty status." FMFO 5370.3.

A review of the facts in this case shows that the military uses the prior restraint regulations to prohibit proper petitions. Statements by the commanding officers denying approval of requests to circulate petitions and other materials amply demonstrate that the command's decisions were the result of, at best, disagreement with the substance of the petitions or the result of whim and caprice. In fact, the actions of the military officials were so insupportable that the government found itself forced to concede error with regard to all denial actions by the command. *Huff v. Secretary of the Navy, supra*, 575 F.2d at 909.[8] The facts here lead

[8]The petitions in this case did not involve the specific military mission at Iwakuni or any complaints about conditions there. The petitions were concerned with matters of general interest to citizens and members of the military. Given the facts here, one need not wonder what action the command would have taken, for example, on a request to circulate a petition to Congress complaining about racial discrimination on base.

one to conclude that the entire purpose of the regulations is to inhibit the circulation of petitions by requiring prior approval. And the District Court below so found: "It is clear to this Court from these undisputed facts that plaintiffs' requests were denied on the basis of the *content* of the petitions and leaflets, rather than legitimate military security requirements." *Huff v. Secretary of the Navy*, 413 F. Supp. 863, 868 (D.D.C. 1976).

The government, in its Petition for a Writ of Certiorari (Pet. 14), contended: 'The regulations at issue in this case strictly limit the grounds on which commanders can disapprove circulation of petition. It therefore can be expected that most petitions will be approved for circulation." And now in its brief, the government states (Br. 46): "A base commander will withhold approval of the distribution of petitions only where they present a 'clear danger' to military discipline, loyalty and order." But, as demonstrated by the facts in this case, the requests to circulate petitions were denied for reasons outside the language of the regulations. The one time the language of the regulations was employed, the commanding officer disapproved one respondent's request to distribute a leaflet as "a clear hazard to discipline and morale;" yet, on the very same date, that same commanding officer approved the distribution of that very same leaflet by another respondent! Thus, it is perfectly plain, as three courts of appeals have now held, that the right of military members to petition cannot be effectively exercised under regulations requiring prior command approval.[9]

[9]The system of prior restraint under review here contains no procedural safeguards of any kind. See *Freedman v. Maryland*, 380 U.S. 51 (1965); *Southeastern Promotions, Ltd. v. Conrad, supra.* The request to circulate a petition is made by a service-

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2. The regulations are not necessary to the security of the United States.

10 U.S. Code §1034 permits two exceptions: first, if a communication is "unlawful"; second, if a communication violates a "regulation necessary to the security of the United States." No contention has ever been made in this case that the communications involved are in any manner unlawful. The government does contend, however, that the regulations involved here are necessary to the security of the United States and therefore fit within the exception. (Br. 42).[10]

(footnote continued from preceeding page)
member to the commanding officer and it is either denied or approved *ex parte* by that commanding officer; there is no hearing of any nature or review of that command decision. *Compare Greer v. Spock*, 424 U.S. 828 (1976). The one "procedural" requirement of the regulation is that the servicemember must request approval at least 25 days prior to the petitioning activity! *See* MAWO 5370.1B(6)(e)/MCASO 5370.3B(6)(e).

[10]The otherwise necessary balancing between First Amendment freedoms and military necessity is not presented in this case. As stated by the Court below, *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912:

> "In enacting this statute, Congress has eased the task of the courts in evaluating the validity of military restrictions on the right to petition. The statute not only indicates that free and unrestricted communication by members of the armed forces with the Congress or members thereof is of particular concern to the legislative branch, but also commands that such communication be subject to additional protection beyond that afforded other kinds of speech by the first amendment. Whatever standards may be held to apply generally to restrictions on petitioning and related activity cannot be less stringent than those provided in §1034. Thus, the statute represents a legislative evaluation of the competing interest in free expression of views to

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A review of the legislative history shows only one statement concerning the two exceptions to the basic protection of the statute. Mr. Vinson, in initially introducing the revised amendment, stated that the communication could be "on any subject if it does not violate the law or if it does not deal with some secret matter." 97 Cong. Rec. 3877 (1951). Quite clearly, the regulations under attack here do not limit themselves to protecting secret matters. The wording of the regulations and the broad sway given the command in exercising discretion, for the most part, cover areas well beyond the concept of security as it pertains to "some secret matter." Thus, if a strict literal interpretation of the statute and its legislative history are to prevail, the regulations are unquestionably invalid. In fact, at no point has the government even hinted that the purpose of the regulations is to protect secret matters.

The government rather argues that some prior restraint over on-base petitioning activities of service personnel is essential and that, therefore, the regulations under review are necessary to the security of our nation (Br. 42.) Indeed, the government contended in its Petition for a Writ of Certiorari (Pet. 10) that the decision below has worldwide effect for our national security. A reading of the government's argument makes one wonder how we have survived as a nation, given the fact that the injunction in this case was originally issued

(footnote continued from preceeding page)
members of Congress, on the one hand, and the special requirements of the military, on the other. The difficult balancing which would otherwise have to be accomplished by the judiciary has been legislatively resolved: restrictions imposed upon lawful communications to Congress must be 'necessary' to the national security."

by the District Court on May 27, 1976. That injunction, despite its supposed worldwide adverse effects, has been in existence for over three years and the government has never requested a stay from the District Court, from the Circuit Court, or from this Court.[11]

The only procedural requests the government has filed in this Court and below have been motions, numerous ones, for extensions of time. Although the judgement below was entered on March 15, 1978 (and the petition for rehearing and rehearing *en banc* was denied on May 15, 1978), the government requested an additional thirty days, beyond the ninety permitted by statute, for filing a writ of certiorari because additional time was needed to determine whether to file a petition in this case! Moreover, since no request for a stay has ever been made, there have been no presentations by the government at any stage of the proceedings which show that the respondents' activities or the court's injunction have actually interfered with the proper functioning of the military All this clearly demonstrates that there is no merit to the government's "national security" contentions.[12] [13] The freedom from

[11]The original injunction issued by the District Court was actually broader than the outstanding injunction resulting from the decision of the Court of Appeals, since it included within its scope the distribution of materials as well.

[12]The conclusory allegations found in the affidavit of a Marine general (Pet. App. G 58a-63a) did not impress the District Court or the Court of Appeals below The fact that at no stage has the government requested a stay of the injunction belies the allegations of the affidavit.

[13]Approximately four years ago, a similar injunction was issued in *Allen v. Monger*, 404 F. Supp. 1081 (N.D. Cal. 1975). Likewise, in that case, the government has made no request for a stay of the injunction at any stage. *See* Opposition to Petition for Certiorari at 3-4, *Brown v. Allen*, No. 78-1005, October Term, 1978.

prior restraint over petitioning activities "does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security." *Greer v. Spock*, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting).

As found by the Court below:

> "We conclude that no showing has been made that a system of prior restraint of petitioning activities on the Iwakuni Air Station is necessary to the national security. Findings of the District Court with respect to the nature of the military mission at the base are not extensive, but it is clear that the station is not an actual and current combat zone." [Compare *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).] While an affidavit introduced in the Court below states that base is 'combat-ready,' there are no combat activities performed by base personnel during peace time. We understand that order and discipline might be more tightly maintained were commanders given the opportunity to screen petitions prior to their circulation, but we do not think that the national security can be said to require that the objective of military discipline be pursued at the exclusion of all other interests. If this were the case, then §1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline. We agree with the District Court that as long as the on-base petitioning activity is performed away from restricted or work areas during off-duty hours, there should be no prior approval required for these activities because such approval is not 'necessary to the national security.'" *Huff v. Secretary*

of the Navy, supra, 575 F.2d at 914. [Footnote omitted.][14]

The striking down of the system of prior restraint will not leave the military helpless against service members who originate, sign, distribute, or promulgate petitions which are truly improper in their content. *Huff v. Secretary of the Navy, supra*, 575 F.2d at 912, 914. As shown by Enclosure 1 to DOD Directive 1325.6, under the heading "Constitutional and Statutory Provisions Relevant to Handling of Dissident and Protest Activities in the Armed Forces," there are five general criminal statutes and nine sections of the Uniform Code of Military Justice listed which can be employed by the military to impose penalties (and the threat of penalties) for improper communications. Indeed, two of the respondents in this case were arrested just outside the gate at the Iwakuni Air Station for distribution of a letter addressed to a member of Congress because they had not sought prior command approval. *See Parker v. Levy*, 417 U.S. 733 (1974).

Accordingly, as shown by the facts of this case, the challenged regulations imposing a system of prior restraint are not "necessary to the security of the United States."

B. Greer v. Spock Does Not Support the Validity of the Regulations.

Throughout the history of this case, the government has contended that this Court's decision in *Greer v.*

[14]"As did the District of Columbia Circuit in *Huff*, we hold that the Navy has failed to show that the national security required a system of prior restraints in these cases." *Allen v. Monger, supra*, 583 F.2d at 442.

Spock, 424 U.S. 828, requires reversal of the lower court's decisions. In *Greer v. Spock, supra*, this Court was faced with a question of the authority of the military to prohibit civilians from entering a basic training military reservation for purposes of making campaign speeches and to require prior approval before allowing the distribution or posting of partisan political campaign literature at that same base. Here, in contrast, respondents are members of the military itself seeking to circulate *petitions* among other members of the military on their own base (which is not a basic training camp) pursuant to their rights under 10 U.S. Code §1034. As stated by the Court below:

> "We find *Greer* neither controlling nor persuasive with respect to the issue of the validity of the regulations implementing a system of prior restraint on petitions at the Iwakuni Air Station. Most significantly, of course, the holding in *Greer* was constitutionally based. The *Greer* Court had no occasion to consider the validity of that prior restraint regulation under §1034 because petitions to Congress were not involved in *Greer*." *Huff v. Secretary of the Navy, supra*, 575 F.2d at 915.[15]

The Ninth Circuit subsequently agreed with this view:

> "*Greer v. Spock* . . . , which the government emphasizes, does not apply to the case. *Greer* rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit." *Allen v. Monger, supra*, 583 F.2d at 442.

[15]The respondents do not in any way concede that the voided regulations are constitutionally permissible. See *Huff v. Secretary of the Navy, supra*, 575 F.2d at 911, 915.

To the extent that the rationale in *Greer v. Spock, supra*, is based on the maintenance of "a politically neutral military establishment under civilian control," it would seem that 10 U.S. Code § 1034 was specifically designed to protect that tradition. Any system of prior restraint upon the right of petition protected under the statute would undermine that objective.

In addition, unlike the situation in *Greer v. Spock, supra*, there are no alterative avenues at Iwakuni in which political expression may be voiced, for the entire area comes under the system of prior restraint instituted by the challenged military regulations. Prior approval is required for the origination, signing, distribution, or promulgation of petitions "anywhere within a foreign country, irrespective of uniform or duty status." FMFO 5370.3. The District Court below found that

> "American servicemen stationed in a foreign country have even less access to information and ideas concerning domestic politics than the soldiers in boot camp who are free to attend rallies and receive information from civilian off-base sources. Therefore, the need to assure a free flow of information and ideas is crucial in the foreign base situation. . . . Establishing lines of communication among servicemen is especially important on bases in foreign countries which may have more restricted access to civilian sources of ideas than their counterparts in the States." *Huff v. Secretary of the Navy, supra*, 412 F. Supp at 867-69.

Accordingly, this Court's decision in *Greer v. Spock, supra*, contrary to the government's contentions (Br. 48), does not conflict with the decision of the Circuit Court below and does not require reversal of that ruling.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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No. 78-599

In the Supreme Court of the United States

OCTOBER TERM, 1979

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Solicitor General
Department of Justice
Washington, D.C. 20530

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1. In describing the challenged regulations, respondents state that they contain "no procedural safeguards of any kind" (Br. 23 n.9). Respondents' description of the regulations is incorrect. The regulations require military commanders to report any refusal to authorize distribution of materials to headquarters authorities. See AFR 35-15(3)(a)(2); FMFO 5370.3, §4(c). See also *Greer* v. *Spock*, 424 U.S. 828, 831 n.2 (1976). Any serviceman who believes that his commander acted improperly by refusing to permit distribution of a petition may file a complaint with the commander's superior officers. 10 U.S.C. 938. The complaint must then be investigated and redressed if the commander's action was in error; and the Secretary of the military department is to be informed of the proceedings had on the complaint "as soon as possible." *Ibid.* Further review of the commander's decision may also be obtained by filing an action in federal district

court. See *Cortright* v. *Resor*, 447 F. 2d 245, 250-255 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). There are thus substantial procedural safeguards to ensure proper application of the substantive regulatory scheme.

Respondents do not contend that these procedures fail to satisfy any requirements of due process, and none of the courts below—either in this case or in *Brown* v. *Glines*—considered any such claim. The issue is thus not properly framed for review. We note, however, that the standards employed by the commander and his superiors in determining whether the on base distribution of petitions should be prohibited are drawn narrowly to reflect the government's most substantial concerns,[1] and the availability of prompt review of the commander's determination safeguards against arbitrary misapplication of the regulation. Even in the analogous context of civilian regulation of government facilities that are not public forums, these procedures would suffice. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555, 560 (1975)[2]. This is especially so here, where the

[1]The challenged regulations authorize commanders to prohibit distribution only when a petition would "[m]aterially interfere with the safety, operation, command, or control of his unit," "[p]resent a clear danger to the loyalty, discipline, morale, or safety to personnel of his command," "[i]nvolve distribution of material * * * that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter," or "[i]nvolve the planning or perpetration of an unlawful act or acts." FMFO 5370.3, §4(a) (1974). See also DOD Dir. 1325.6, para. III(A)(1) (1969). These narrowly drawn restrictions obtain specific content from military custom and usage. See *Parker* v. *Levy*, 417 U.S. 733, 753-760 (1974).

[2]In *Southeastern Promotions, Ltd.*, the Court held that, where a licensing requirement limits access to a public forum, the decision to withhold the license may have effect "only for a specified brief

military need "to maintain the discipline essential to perform its mission effectively" "may render permissible within the military that which would be constitutionally impermissible outside it." *Parker* v. *Levy*, 417 U.S. 733, 744, 758 (1974).[3] The regulations afford a prompt and reasonable means for determining whether distribution should be permitted while maintaining in the interim the discipline and morale that is essential to the military mission. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Although the issue is not presented in this case, the regulations do not deny due process. See *Terrell*, *supra* note 3, 28 Emory L.J. at 44-48.

2. Respondents argue (Br. 25-26) that the challenged regulations are shown to be unnecessary to national security by the government's failure to seek a stay of the injunction entered by the district court against application of the regulations at the Iwakuni military base. But the government has not contended that injunctions applicable

period" pending judicial review. 420 U.S. at 560. But the procedural requirements established in *Southeastern Promotions, Ltd.* apply only to licensing for the "use of a public forum" (*ibid.*) and are expressly inapplicable where the applicant "seek[s] to use a facility primarily serving a competing use." *Id.* at 555. When a facility is not a public forum to begin with, the power to deny its use in advance of actual expression is not constitutionally suspect. When an applicant seeks use of a military base—which plainly is not a public forum—for petitioning purposes, the base commander need not seek immediate judicial approval to protect the base from what is "perceive[d] to be a clear danger to the loyalty, discipline, or morale of troops * * * under his command." *Greer* v. *Spock*, *supra*, 424 U.S. at 840. See also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 300-303 (1974) (opinion of Blackmun, J.).

[3]"None of the cases involving First Amendment 'due process' requirements deal with situations remotely resembling those faced by the military. The function performed by a pornography censor cannot be constitutionally equated with the function of the military." Terrell, *Petitioning Activities on Military Bases: The First Amendment Battle Rages Again*, 28 Emory L.J. 3, 45 (1979) (footnote omitted).

to only a few plaintiffs or one military base create a demonstrable likelihood of immediate irreparable injury to the nation's defense.[4] We have argued instead that the nation's military preparedness would be threatened if—as the court of appeals concluded—military commanders world-wide were powerless to prevent the on base distribution of petitions that present a "clear danger to the loyalty, discipline, morale, or safety" of their commands. FMFO 5370.3, §4(a) (1974). See note 1, *infra*. It is the nation-wide and world-wide weakening of military preparedness that threatens the nation's security. It is to avert that broader result that we seek reversal of the decision below.

For the reasons stated here and in our opening brief in this case and in our briefs in *Brown* v. *Glines*, the decision of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

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[4]It is ordinarily possible to reassign sensitive defense functions from one base to another at any given point in time.

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